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Supreme Court of the United States

October Term, 1915.

JOHN F. CUBBINS, Appellant,
vs.
THE MISSISSIPPI RIVER COMMISSION AND THE YAZOO-MISSISSIPPI DELTA LEVEE BOARD.

No. 299

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

BRIEF OF COUNSEL FOR APPELLANT.

STATEMENT OF THE CASE.

I.

On the 20th day of January, 1913, appellant, John F. Cubbins, a citizen and resident of the County of Shelby, State of Tennessee, in his own behalf and in behalf of other members of the Riparian Land Owners' Protective Association, filed this Bill in Equity, in the District Court of the United States for the Northern District of Mississippi.

The bill alleges that apellant is the owner of certain land situated in the County of Shelby, State of Tennessee, exceeding in value the sum of three thousand ($3,000.00) dollars and that the other members of the Riparian Land Owners' Protective Association own lands similarly situated and similarly affected as is that of appellant. That from time immemorial, the waters of the Mississippi River, during the high stages thereof, were not contained in the low water banks of the river, but found outlet below Cairo, Illinois, into the St. Francis River Basin, in the State of Arkansas, into the White River, Yazoo, Tensas, Atchafalaya and Pontchartrain Basins, and through the rivers draining those Basins, eventually into the Gulf of Mexico. That prior to the construction of levees and the confinement and obstruction of the ordinary high waters of said river thereby, the land of appellant was from three to ten feet below the highest flood waters of the Mississippi River and the said flood waters did not overflow his land nor interfere with the use or occupancy thereof; and the outlets and drains provided by nature through the basins aforementioned

were sufficient to carry off the high waters of said river and to prevent appellant's said land from being flooded or injured by the annual high waters of the river.

That about the year 1883 the officers and agents of the United States adopted the Eads plan for the improvement of the navigation of the Mississippi River; and appellee, the Mississippi River Commission, acting in association with the various Levee Districts, appellees herein, whose purpose was and is the reclamation of lands in their respective districts, constructed, maintained, enlarged, repaired and are now constructing, maintaining, enlarging and repairing levees approximately twenty feet high, on both sides of said river, from Cairo, Illinois, to the head of the Passes to the Gulf, a distance of one thousand and fifty miles. That since the said year 1883, this work has been under the direct supervision and control of the appellee, Mississippi River Commission. That the lines of levees so constructed, maintained, enlarged and repaired, have been joined by the appellees into a continuous line, as contemplated by the Eads plan, so that the Mississippi River is now leveed on both sides, except on the east bank from Cairo, Illinois, to a short distance below Memphis, Tennessee, and from Vicksburg, Mississippi, to Baton Rouge, La. That by the said acts of the appellees, the high waters of the Mississippi River are confined and obstructed, in their high water bed, by and between said levee lines and the hills on the eastern bank where there are no levees and thus encompassd within a narrower high water channel than naturally; and as a result, the said waters have

acquired an increased velocity and a higher elevation of more than six feet and such velocity and elevation are being further increased and the current is becoming stronger and more forceful. That in June, 1910, the grade established for levees by the Mississippi River Commission and used also by the other appellees, was from two to five feet higher than the highest previous stage of the river. That since the year 1910 the grade has been increased more than three feet; that even such increased grade has proved to be insufficient for the purposes of the appellees and in the year 1912 the waters of the Mississippi River flowed over the line of levees and broke through them in numerous places. That the appellees are now engaged in closing gaps and breaks in the said line of levees and are repairing and raising the grade and making further enlargements of said levees. That the result of the construction, enlargement, maintenance, repair and increase in height of the line of levees by the appellees has been and is to obstruct and confine the high waters of the river in the high water bed, and to raise the level of the water to an unnatural height, so that, within five years immediately prior to the filing of appellant's bill, the said high waters, for the first time attained a sufficient height to flow over his land; and when there is now a high water stage in said river, the waters thereof overflow and remain standing upon and over his land to a depth of four to eight feet, which they would not do were it not for the said levees, interrupting appellant in the profitable use, occupation and enjoyment of his land; covering his land with superinduced additions of sand, silt and gravel, now from six inches to three feet in depth;

washing away the houses and fences thereon; rendering his land and the houses thereon unfit for occupancy; driving away the tenants; doing irreparable harm and injury to said land; impairing its usefulness; causing the practical destruction thereof and destroying its market value.

The bill further alleges that the injury is a continuing one and will be repeated annually when the Mississippi River reaches its high water stage. That any attempt to recover damages in a Court of Law would involve appellant in an interminable multiplicity of suits; that the appellee Levee Districts are insolvent; that no proceedings for the condemnation of appellant's land have been instituted by any of the appellees nor has any provision been made in any Act of Congress or of any of the States under which the appellee Levee Districts are incorporated, to compensate him for his land so being taken and destroyed; and that no compensation has been paid to him therefor.

That by reason of these acts he is being deprived of his property without due process of law and his private property is being taken for public use without just compensation, in violation of the Constitution of the United States and of Articles V. and XIV. in amendment thereof.

The prayer of the bill is that an injunction be granted enjoining and restraining all the defendants, their officers, agents and contractors, from constructing, maintaining, enlarging or repairing any levee or levees along the Mississippi River; and for general relief. (Pages 2 to 10 of printed record.)

An amended Bill was filed alleging that the overflow of appellant's land had occurred for the first time, within one year immediately prior to the filing of the bill; and the prayer was amended by praying for the transfer of the case to the Law side of the Court, in the event that no relief was granted in Equity, and a trial as an action at Law, for damages, according to Equity Rule 22.

(Page 13 of printed record.)

PROCEEDINGS IN COURT BELOW.

II.

The Court below entered a decree sustaining a motion by the defendants to dismiss the bill.

Record p. 18.

ARGUMENT AND BRIEF.

III.

STATEMENT.

Since this case is before this Court on appeal from a decree dismissing the bill on motions to dismiss made by appellees, it will be assumed by counsel for appellant that the allegations of fact in the bill are admitted to be true, for the purpose of this argument.

It is respectfully submitted that the Court below erred, as is set forth in the assignments of error.

Record p. 22.

QUESTION OF GENERAL LAW.

IV.

The first question arising in the determination of the case is whether the rights and liabilities of the parties are to be determined by the law of the State courts or by the law of the Federal courts; whether the "local" law, or the "general" law is to control.

We respectfully submit that the right of the appellee Levee District, for the reclamation of lands, to construct levees along the Mississippi River, a navigable fresh water stream, which have the effect of obstructing the natural flow and turning the water upon the lands of an owner on the opposite side of the river, is not a local question; but is one of general law, on which decisions of the State courts are not binding on the Federal courts.

Cairo, Vincennes & Chicago Ry. Co. v. Brevoort, 62 Fed. Rep. 129.

Hollingsworth v. Tensas Commissioners, 17 Fed. Rep. 115, 4 Woods 280.

PROPERTY.

V.

The term "Property" in its legal signification, means only "the right of the owner to possess, use, enjoy and dispose of a thing."

Eaton v. Boston C. & M. R. Co., 51 N. H. 511.

The land of appellant, in its natural condition, was from three to ten feet above the highest natural flood heights of the Mississippi River and the high-

est natural floods did not overflow it nor interfere with the use and occupancy thereof. (Page 6 of printed record.) His property in his land was full, absolute and complete. His right to use, possess and enjoy it was unlimited and unqualified. In its natural condition his land constituted neither a part of the bed nor a part of the bank of the river.

Paine Lumber Co. v. United States, 55 Fed. Ref. 866.

Carpenter v. Board of Commissioners, 56 Minn. 513.

Appellant had an entire, absolute and unqualified property in his land on the eastern side of the Mississippi River, situated above the highest natural flood waters. His land was subject to no easement or servitude in favor of appellees or any other person. It was "upland," as that word was used by this Court in the case of Chandler Dunbar Water Power Co. v. United States, 229 U. S. 70.

EMINENT DOMAIN AND THE POLICE POWER.

VI.

The distinction between the Police Power and the right of Eminent Domain is a question of general jurisdiction and not one of local law.

Hollingsworth v. Tensas Commissioners, supra.

The construction of works, for the improvement of navigation, is an exercise of the power of Eminent Domain and the owner of private property "taken" for that purpose must be compensated.

United States v. Lynah, 188 U. S. 445.
Armond v. Green Bay & M. C. Co., 31 Wis. 316.
King v. United States, 59 Fed. Rep. 9.
Williams v. United States, 104 Fed. Rep. 50.
Carlson v. St. Louis River Imp. Co., 73 Minn. 128, 41 L. R. A. 371.
Velte v. United States, 76 Wis. 278, 45 N. W. 119.
Desty Federal Constitution 322.

The construction of levees for the reclamation of lands from overflow, although referable in a certain sense to the Police Power, is likewise an exercise of the Power of Eminent Domain and the owner of property "taken" for such purpose, must be compensated therefor.

Reelfoot Levee District v. Dawson, 97 Tenn. 172.
Chicot County Levee Board v. Crittenden, 94 Fed. Rep. 613, 36 C. C. A. 418.
Hollingsworth v. Tensas Parish, 17 Fed. Rep. 108.
Head v. Amoskeag Mfg. Co., 113 U. S. 9.
Hughes v. Levee Commissioners (Miss. 1900), 27 Sou. Rep. 744.
Ex Parte Martin, 13 Ark. 198, 58 Am. Dec. 321.
Carlson v. Board of Dir. St. Francis Lev. Dist., 59 Ark. 513.

In the case of Eldridge v. Trezevant, 160 U. S. 452, referring to the case of Bass v. State, 43 La. Ann. 494, this Court said:

> "If to approve the judgment in that case, it were necessary to hold that the State and its agents can take private property, wherever it is situated and apply it to any public purpose and escape from the duty of compensation by terming such action as exercise of the Police Power, it is difficult to see how such a conclusion could be reached by the courts of a State in whose constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made."

In this case the Court held that there was no liability to pay for property taken for levee purposes, because of the servitude which existed in Louisiana under the particular laws of that State, permitting such a taking without compensation.

Such servitude is peculair to that State and is clearly limited to Louisiana and does not apply to any of the States whose constitutions are founded on the Common Law.

> Chicot County Levee Board v. Crittenden, 94 Fed. Ref. 613.

The Police Power, under which, as in the case of Reelfoot Lake Levee District v. Dawson, 97 Tenn. 172, it has several times been attempted, in vain, to justify the "taking" of private property for levee purposes, without compensation, is founded upon the maxim *sic utere tuo ut alienum non leadas,* which is very different from the Power of Eminent Domain. The Police Power extends only to the regulation of the private injurious use of property and to hold that, by reference to it, the right exists to TAKE the property of ANOTHER for the purpose of enhanc-

ing the value of one's own, would be a subversion of the very maxim upon which the alleged right is admitted to be founded.

Dillon Munic. Corp., Par. 93.
Cooley Const. Lim., p. 594.
Penrice v. Wallis, 37 Miss. 172.
Sweet v. Rechel, 159 U. S. 399.

The primary purpose for which levees are constructed by the appellee Levee Districts, along the Mississippi River, is the reclamation of land. The land in the basins, or high water bed of the river, in a state of nature, was subject to the burden of storing the waters of the Misissippi River, during the annual spring freshets or floods. The appellee, Mississippi River Commission, in its report for 1912, at page 3724, referring to the levees, says: "Their immediate and main value is the protection of the alluvial lands for the benefit of their owners." Such "protection" constitutes RECLAMATION in its true sense.

Hagar v. Reclamation District, 111 U. S. 701.
Leovy v. United States, 177 U. S. 621.
Maingault v. Springs, 199 U. S. 473.

In Carson v. Board of Directors of St. Francis Levee District, supra, the Court said (page 532):

> "The leveeing of the western bank of the Mississippi River to prevent the periodical inundation of the lands included in the District, is undoubtedly, a local improvement having for its object, primarily, the reclamation and enhancement of the value of the lands included therein, and, secondly, and consequently, to add to the

> prosperity, welfare, comfort, convenience and wealth of the whole State. * * * Perhaps it is safe to say that when the taking of private property for the location of the necessary levees, ditches and drains becomes necessary, the right of Eminent Domain will be asserted."

In Reelfoot Lake Levee District v. Dawson, supra, the power to levy taxes for the construction of levees was held not to be authorized under the Police Power. The Court said (page 173):

> "The paramount idea is a fund to reclaim from inundation a large body (some 300,000 acres) of land in the Mississippi valley and thereby enhance its value and the wealth of its owner. Strictly speaking, it is without an element or feature of regulation. * * * We hold unhesitatingly that this legislation is in no sense referable to the Police Power of the State and that it cannot be justified thereunder."

LEVEES UPON OPPOSITE SIDE OF STREAM.

VII.

An owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood water, in times of ordinary flood, over his side and cast them upon land on the opposite side.

> Cairo V. & C. Ry. Co. v. Brevoort, 62 Fed. Rep. 129.
>
> Rex v. Trafford, 20 Eng. C. L. R. 498, 1 B. & Ad. 874.
>
> Paine Lumber Co. v. United States, 55 Federal 854-5, also 864-5.

Woodruff v. N. B. G. M. Co., 18 Federal 782-3-4, also 797 and 809-10.

Jones, Admr., v. U. S., 48 Wis. 385.

Velte v. U. S., 76 Wis. 278.

Burwell v. Hobson, 12 Gratt. 322.

O'Connell v. The E. T. Va. & Ga. R. R. Co., 87 Ga. 246-261.

Garrish v. Clough, 48 N. H. p. 9.

Parker v. City of Atchison, 48 Pac. 631-2.

Shane v. K. C. St. Joseph & C. B. R. Co., 71 Mo. 237.

Gulf R. Co. v. Clark, 2 Ind. Ter. 319.

Barden v. City of Portage, 79 Wis. 126.

Crawford v. Rumbo, 44 Ohio State 279.

Sullivan v. Dooley, 31 Tex. Civ. App. 589.

Byrd v. Blessing, 11 Ohio State 362.

Myers v. St. Louis, 8 Mo. App. 266.

Menzies v. Breadelbane, 3 Bliss N. S. 414-423.

Rix. v. Johnson, 5 N. H. 520.

Jones v. Soulard, 24 How. (U. S.) 41.

Adams v. Frothingham, 3 Mass. 352.

Rex v. Lord Yarborough, 3 B. & C. 91.

Scranton v. Brown, 4 B. & C. 485.

"The injured proprietor is equally entitled to redress whether the damage is occasioned by a diversion of water, by back water, by inundation from above his land, or by percolation of the water through the banks."

Gould on Waters, Sec. 209 and notes.

WHAT CONSTITUTES A "TAKING" OF PROPERTY.

VIII.

The crucial question, in the case at bar, by the

determination of which both the assignments of error may finally be resolved, is this: "Do the allegations of appellant's bill show a 'taking' of his property within the constitutional provisions requiring compensation?"

This Court has frequently decided what constitutes a "taking" of private property for public use. The first important case is that of Pumpelly v. Green Bay Co., 13 Wall. 166, followed by the case of United States v. Lynah, 188 U. S. 445.

The facts in the Pumpelly case, supra, in part were:

> "The Green Bay and Mississippi Canal Company erected a dam across Fox River, the northern outlet of Lake Winnebago, raising the waters of the lake so high as to forcibly and with violence overflow 649 acres of Pumpelly's land, the water coming with such violence as to tear up his trees and grass by the roots, and wash them with his hay by the tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water and to dirty and injure other parts by bringing and leaving on them deposits of sand and otherwise injuring them. This dam was not on Pumpelly's land, but removed from it some distance. The overflow was the result of the building of the dam."

In the language of the Supreme Court in Pumpelly v. Green Bay Co., supra:

> "The backing of water so as to overflow the lands of an individual, or any other superinduced addition of earth, water, sand and other material, or artificial structure placed on land, if done under statutes authorizing it for the pub-

lic benefit, is such a taking as, by the constitutional provisions, demands compensation.

It is not necessary that the property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of the constitutional provision, but there may be such serious interruption to the common and necessary use of the property as will be equivalent to a taking, within the meaning of the statute."

Boston & R. M. Com. v. Norman, 12 Pickering 467.

Hooker v. The N. H. & M. Co., 14 Conn. 146-160-1.

The facts in the Lynah case, supra, in part are:

"The dams, training walls, jetties and other obstructions were not located on the Lynah land, but many miles therefrom, along the shore of the Savannah river, extending from the bank out into the bed of the river, which at times produced an increased flowage of 18 inches of water on the land; that is, backed the water on the land. The water was backed onto and invaded the land as the result of the public works."

When giving a statement of the facts in the Lynah case, supra, the Court said (page 451):

"The government does not in a sense take the land for the purpose of putting its obstruction on it. But it forces back the water of the river on the land as a result necessary to the purpose, without which its purpose could not be accomplished."

Again (page 469), in speaking of the Pumpelly case, supra, the Court said:

> "On the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that as far as respects the mere matter of flowing and injury there is no substantial difference between the Lynah and Pumpelly cases."

In the case of King v. U. S., 59 Fed. Rep. 9, the Court held that:

> "Flooding of a plantation by a government dam so as to render it unfit for cultivation, is a taking for public use requiring compensation, although the Government actually occupies no part thereof. * * * The Government has not gone into actual occupancy of this land. But by reason of the public work, occasioned by the public work fulfilling its purpose, the water in the Savannah River has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced up into it making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided."

This opinion in the King case was affirmed in the case of Lowndes v. United States, 105 Fed. 836.

See also:

U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
High Bridge Lumber Co. v. United States, 69 Fed. Ref. 326.
Paine Lumber Co v. United States, 55 Fed. Ref. 854.
Jones, Admr., etc., v. U. S., 48 Wis. 385.
Velte v. U. S., 76 Wis. 278.
U. S. v. Welch, 217 U. S. 333.
Grizzard v. U. S., 219 U. S. 180.

In the case of United States v. Sewell, 217 U. S. 601, decided in 1910, the officers and agents of the United States constructed a dam across the Kentucky river, at a point about three and a half miles below the plaintiff's farm, which caused the water of the river to back up into the mouth of Four Mile Creek and upon plaintiff's land, causing a pool of water to cover twenty acres of his land, permanently; and causing THE TEMPORARY FLOODING, FOR A FEW WEEKS EACH YEAR, OF AN ADDITIONAL TWENTY ACRES, DURING THE ANNUAL SPRING FRESHETS, at cropping season; thus interfering with the use and cultivation of the additional twenty acres and destroying its value.

This Court affirmed the judgment for the value of the entire forty acres.

United States v. Sewell, supra.

The facts in the Sewell case, with regard to the twenty acres destroyed by temporary flooding, and the allegations in the cases at bar, are identical. The Court below, in the Sewell case, supra, in its opinion, affirmed by this Court, referred to the recurring overflows of the twenty acres temporarily flooded for a few weeks annually, in the following language:

> "This, then, being the case, it follows that this portion of the creek bottom land is also permanently affected by the dam so as not to be capable of successful cultivation. Water does not stand over or through it all the time, as in the case of the twenty acres hereinbefore referred to. Indeed, it is upon it only for a very short time. But it is a reasonable conclusion that it will be over it every year, and that at a

> time when it will destroy any crop that may be planted thereon. It is so certain that such will be the case as to deter any reasonable person from attempting to crop it. This injury thereto, may, therefore, be said to be a permanent one—though its permanency is not of the same character as that of the twenty acres."
>
> United States v. Sewell, supra, page 9, transcript of record.

The contentions that all injuries resulting from work done in aid of commerce or navigation are, AS A MATTER OF LAW to be deemed "consequential," merely because they result from such work was completely answered by this Court in the Lynah case, supra.

On page 471, in the Lynah case, the Court says:

> "Passing to the third question, it is contended that what was done was in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing work injury results to riparian proprietors or others, it is an injury which is merely consequential and for which the government is not liable. But if any one proposition can be considered settled by this Court, it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth amendment of paying just compensation."

In Monongahela Navigation Co. v. U. S., 148 U. S. 312, 336, it was said:

> "But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed

> by such instrument and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."

In Scranton v. Wheeler, 179 U. S. 141, 153, it was said:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

All of these cases recognize the general rule stated by this Court in the case of U. S. v. Chandler-Dunbar Water Power Co., 229 U. S. 70, referred to in the opinion in Jackson v. U. S., 334 U. S. 115:

> "That riparian owners are entitled to have the stream come to them substantially in its natural state, both as to quantity and quality."

As was said by this Court in C. B. & Q. R. R. Co. v. Illinois Drainage Commrs., 200 U. S. 593:

> "There is no conflict on the general subject. The conflict arises in determining particular cases."

In McKenzie v. Miss. & R. Boom Co., 29 Minn. 288, the temporary flooding of lands once or twice

in a period of seven or eight years, was held to be a "taking." The Court, in that case, said:

> "It is clear that to constitute a taking, it is not necessary that the lands should be absolutely appropriated, nor is it necessary that the owner be permanently deprived of the use of it. It is enough to constitute the taking that the owner of the lands is at times seriously interrupted by the public improvement."

McKenzie v. Miss. & R. Boom Co., supra.

After distinguishing the Mills case (46 Fed. 738), the Gibson case (166 U. S. 269), and the Scranton case (179 U. S. 141), this Court stated the rule, in Maingault v. Springs, 199 U. S. 485, in practically the same language as that above, saying:

> "Where there is a practical destruction or material impairment of the value of plaintiff's land, there is a taking which demands compensation."

These rules must be applied in connection with the elemental principle that a defendant is liable only for the direct and proximate results of his acts.

Bierer v. Hurst, 155 Pa. 523, 26 Atl. 742.

These general principles applicable to the cases at bar, might be stated comprehensively as follows:

> "*A riparian owner is entitled to have the stream come to him substantially in its natural condition, both as to quantity and quality; and a practical destruction or material impairment of the value of his land, resulting, directly and proximately from works constructed by another, is a taking which demands compensation.*"

Such a statement of the rule, embraces wholly the principles upon which the cases of Jackson v. United States, 235 U. S. 1, and Bedford v. United States, 192 U. S. 217, are distinguishable from the cases at bar.

The term "natural conditions" is applicable to and should be considered in connection with the ordinary high water stage of the river, as well as the low water stage thereof, in determining the questions in the cases at bar.

Burwell v. Hobson, 12 Gratt. (S. C.) 322, 65 Am. Dec. 247.
Angell Water Courses, Sec. 333.
Rex v. Trafford, 20 Eng. C. L. 726.
Cairo, V. & C. R. R. Co. v. Brevoort, 62 Fed. 129.

CASE OF JACKSON V. UNITED STATES DISCUSSED.

IX.

In the Jackson case, supra, the facts, as stated by Mr. Chief Justice White, in the opinion, were, briefly, as follows:

The Jackson land, in its natural condition was subject to slight overflows and the owners had found it necessary to build a private levee to protect their plantation, before the construction of the levee, or the closing of Bougere crevasse, on the opposite side of the river, by the State authorities, for the reclamation of lands and by the officers of the Government, in aid of navigation.

The Court stated three grounds upon which it was contended that the Government was liable for the injuries to the Jackson lands:

> "1st. The building by the officers of the United States of lines of levees along the bank of the river for the purpose of retaining the water in the river, treating, for the sake of argument, all acts done by the local authorities in building levees or closing breaks as acts of the United States.
>
> 2d. The failure of the United States to build on the east bank of the river along the minor basins which we have fully described, a line of levees so as to afford means of protection from the increased danger of overflow arising from the fact that the lines of levees along the river on the west bank and elsewhere had been raised and strengthened and extended, thus at least beyond doubt temporarily increasing the level of the flood in times of high water.
>
> 3d. The performance of work by the United States tending to diminish the outflow of water from the river through streams which flowed from it, to the end that a more efficient body of water might remain in the stream for the purpose of accomplishing the deepening of the channel and thus more effectively improving the navigable capacity of the river."
>
> Jackson v. U. S., supra, page 13.

It is upon the first of these grounds, that is, "the building of levees" by the appellees, that the appellant, in the cases at bar, bases his right to relief.

Although no cases are referred to in the Jackson opinion supra, in denying liability upon the first ground of complaint, in that case, the decision is perfectly in accord with a well settled and well recog-

nized line of authorities, constituting exceptions to the general rule as recognized in the cases heretofore discussed. Thus, in the Jackson case, supra, emphasis was placed upon the fact, and it was referred to a number of times in the Jackson opinion, supra (pages 7, 8, 13 and 14), that the Jacksons had built a private levee to protect their land, BEFORE THE CONSTRUCTION OF THE LEVEE ON THE OPPOSITE SIDE OF THE RIVER. For this reason, they could not be heard to complain when others did that which they themselves had asserted the right to do. The Jacksons were the first to disturb natural conditions, by building a levee and they could not recover when a levee was built by others on the opposite bank, even though the Jackson levee and land were thereby destroyed.

Avery v. Empire W. Co., 82 N. Y. 582.
Menzies v. Breadalbane, 3 Bligh. N. S. 421.
Wilhelm v. Burleyson, 106 N. Car. 381.
Davis v. Munro, 66 Mich. 485.
Harding v. Whitney, 40 Ind. 379.
Am. & Eng. Enc. of Law, Vol. XXX., 2d. Ed., page 387.

In the opinion in the Jackson case, supra (page 5), Mr. Chief Justice White referred to the order of the Court of Claims overruling the demurrer to the petitions in that case "insofar as they or either of them aver a taking of real estate—within six years from the date of filing of said petitions—by overflow proximately caused by the construction of levees in the improvement of the navigation of the Mississippi River, pursuant to acts of Congress and within the ruling of the cases of Pumpelly v. Green Bay Com-

pany (13 Wall. 166), and United States v. Lynah (188 U. S. 445)."

Bearing in mind this direct reference, in the Jackson opinion, to the ruling in the cases of Pumpelly and Lynah, supra, and bearing in mind the many cases in which this Court has affirmed that ruling, without modification, it is not to be inferred, and counsel for appellant will not assume, that this Court, by the opinion in the Jackson case, without further reference to the Pumpelly and the Lynah cases, reversed, or intended to reverse those cases, or intended to modify the well-settled principles of law established by them and so often affirmed by this Court, without modification. The principle of the Pumpelly case has never been modified.

Mugler v. Kansas, 123 U. S. 667.
Meyer v. Richmond, 172 U. S. 96.
Scranton v. Wheeler, 179 U. S. 154.
U. S. v. Alexander, 148 U. S. 187.

The most that can be assumed from the Jackson decision is, *that the facts therein were not such as to bring the case, or the class of cases which it represented, within the comprehensive rule above stated;* and that *upon the facts,* the Jackson case falls within the exception to the rule and the prior disturbance of natural conditions, by the claimants in the Jackson case, operated, as it were, as an estoppel against their claim for damages from those who subsequently constructed levees upon the opposite bank. As was said in the case of Davis v. Munro, supra:

> "When both parties commit acts in violation of the law, the court will not interfere to determine which is the more culpable."

This exception to the general rule constitutes "the measure of individual right and corresponding nonliability," in accordance with which it was decided in the Jackson case, supra, that there could be no recovery on the first ground of complaint.

Appellant, in the case at bar, relies neither upon the second nor upon the third ground of complaint mentioned in the Jackson case. It is necessary, though, to consider the third contention in that case, in determining whether or not the allegations of appellant's bill show a "taking" within the constitutional provisions requiring compensation. That contention was disposed of as follows:

> "The third consideration, that is, the preventing of the outflow of water by the work done in the tributaries and the consequent increase in the volume of water in the river, cannot be tested from the point of view of individual authority, as the power to do so involves necessarily the exercise of governmental power. We therefore come to consider the proposition in that aspect. In doing so, however, it is to be observed that even if all the previous considerations which we have stated concerning the nonliability to result from building levees, measured by the right of an indivilual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case therefore in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, with-

> out liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open. It was directly ruled as to work done by the Mississippi River Commission in Bedford v. United States, 192 U. S. 225, upon the authority of which case, as we have said, the court below placed its ruling, and as the underlying principles which controlled the decision in the Bedford case and which govern the subject were again at this term with much elaboration stated and applied, we think it unnecessary to do more than refer to that ruling (United States v. Chandler-Dunbar Water Power Co., decided May 26th, 1913), and to direct that the judgment below be affirmed."

In so disposing of this third question, without discussing the distinction between a "taking" and a "consequential damage," this Court determined, only, that, UPON THE FACTS, in the Jackson case the injuries complained of were "remote or consequential."

The term "consequential damages" has been used in applying the comprehensive rule stated by counsel, to designate injuries which, IN FACT, did NOT amount to a "material impairment" of the value of land.

Gibson v. U. S., 166 U. S. 269.
Transportation Co. v. Chicago, 99 U. S. 635.

The permanency of the injury has been expressly treated as one of the determining factors in considering this question.

Hollingsworth v. Tensas Commrs., 17 Fed. 115.
Cumberland Co. v. Hitchings, 55 Me. 140.

The term "Consequential Damages" has also been used to designate those injuries which, IN FACT, did NOT result, directly and proximately, from the work of the defendants.

Bedford v. U. S., 192 U. S. 225.

Its application, in any particular case, however, has always been determined by the FACTS IN THAT CASE and the phrase has been used broadly to designate all those injuries which, IN FACT, were NOT such as to amount to a "taking" within the rule before stated. The use of this term to designate, AS A MATTER OF LAW, injuries resulting from work done by the Government, for which immunity from liability was claimed, regardless of the facts as to proximate cause, or the nature of the injury, has been expressly repudiated by this Court in the several cases already referred to.

United States v. Lynah, supra,
Monongahela Nav. Co. v. U. S., supra.
Scranton v. Wheeler, supra.

Keeping in mind the reference made in the Jackson opinion, to the Pumpelly and the Lynah cases, supra, and bearing in mind the assumption that it was not the intention of this Court in the Jackson case, to reverse those decisions, the designation of the injuries in the Jackson case, as "remote or consequential," can be reconciled on either of two hypotheses, with the comprehensive rule heretofore stated, that:

> "*A riparian owner is entitled to have the stream come to him substantially in its natural condition, both as to quantity and quality; and*

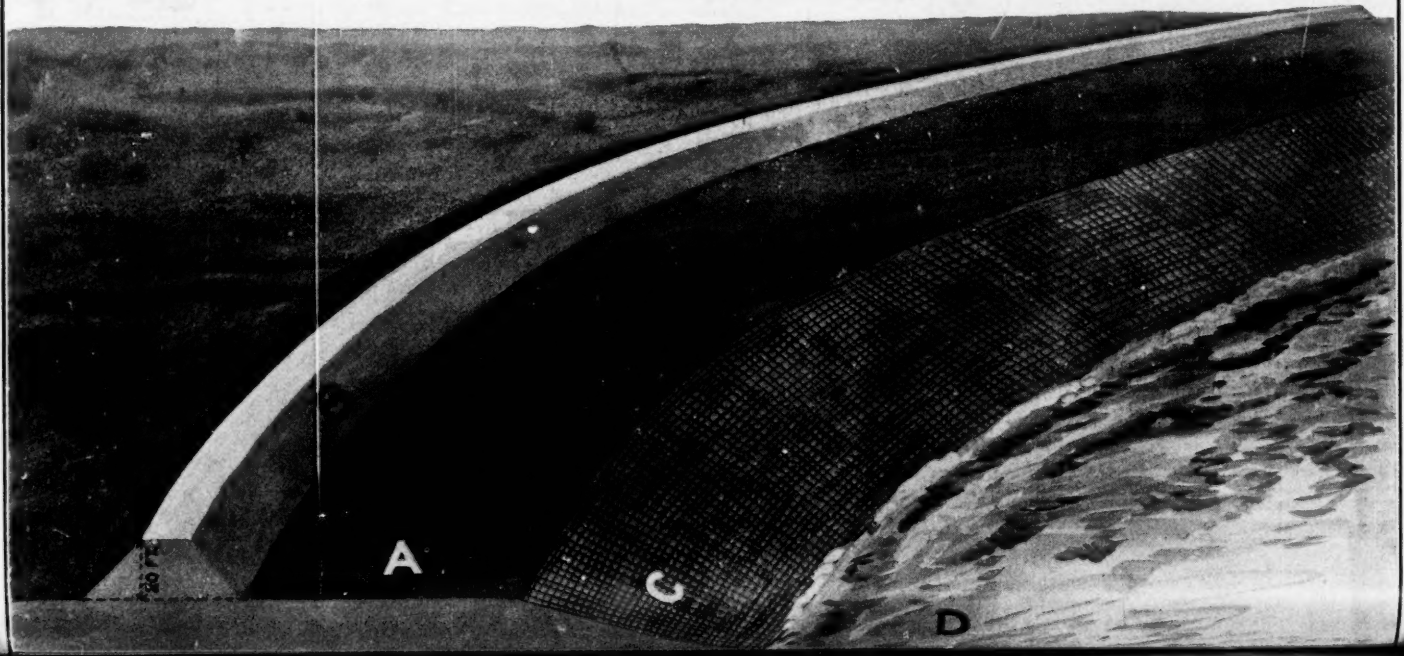
a practical destruction or material impairment of the value of his land, resulting directly and proximately from works constructed by another, is a taking which demands compensation.''

First: The facts in the Jackson case warrant the belief that the injuries might have been held to be ''remote or consequential'' because the work of the government, upon which the third ground of complaint was based, operated only to restore natural conditions at the Bougere Crevasse and the injuries to the Jackson land, insofar as this work was concerned, were not the direct and proximate result of the work; but were the direct and proximate result of the operation of natural forces, after the restoration of natural conditions. This intervention of natural forces, as the direct causes of the injuries, made those injuries ''remote or consequential,'' insofar as the work of the Government was concerned and there was, therefore, no liability on its part.

Barnes v. Marshall, 10 Pac. Rep. 115.
Bedford v. U. S., 192 U. S. 225.
Gulf C. & C. Ry. Co. v. Clarke, 101 Fed. 678.

Secondly: The facts in the Jackson case warrant the belief that the injuries might have been held to be ''remote or consequential'' because the injury alleged in the third ground of complaint amounted to a mere increase in pressure on the Jackson levee (opinion Jackson case, supra, page 14), and the destruction could have been prevented by building the Jackson levee higher. The Government was not liable, upon this theory, because the failure of the Jacksons to build their levee higher and thus prevent the

A - NATURAL SURFACE OF BANK
B - LEVEE
C - REVETMENT
D - WATER



injury, was the direct and proximate intervening cause of the injury and the work of the Government only a "remote or consequential" cause, IN FACT.

Maingault v. Springs, 199 U. S. 485.

THE BEDFORD CASE.

X.

The case of Bedford v. U. S., supra, cited by the Supreme Court in the Jackson case, supra, was one in which also THE FACTS showed a mere "remote or consequential" injury, NOT THE DIRECT AND PROXIMATE RESULT of the work done by the Government and therefore, not a "taking" for which there was liability, within the foregoing comprehensive rule. In that case the Government constructed revetment work along the face of the side of the bank of the river. Revetment is nothing but a facing or matting of willows, covering the side of the channel of the river. Its only result is to resist the erosion of the bank of the river and to prevent the further caving due to natural causes. Revetment preserves the natural condition of the face of the bank and does not add thereto nor increase the height thereof.

The distinction between the results of revetment and the effects of levees appears clearly from the plate attached hereto marked "Plate One," on which "A" is the natural surface of the bank of the river, sloping naturally under "C" and constituting the side of the channel of the river. "B" is a levee, constructed above the natural bank of the river and having the same effect as though the height of the bank

were increased by filling the entire basin to the same height as the levee. "C" is revetment; and "D" is the water flowing in the low water channel of the river. During the ordinary high water stages of the river, the ordinary flood water, in the absence of levees spreads over the surface of the bank "A," in some places for a distance of forty miles. The levee "B" confines the natural high water, prevents it from spreading and obstructs it in its high water bed, giving it an increased elevation of from six to ten feet, thereby flooding appellants land on the opposite side of the river, above the natural and ordinary flood heights.

Page 8, of printed record.
Document No. 1010, 62d Congress, 3d Session, pages 9 and 14.
Report Miss. River Commission, 1910, pages 2937-2939.

The claimant in the Bedford case, supra, contended that the Government was liable for resisting and stopping the operation of natural forces by preventing the further caving of the river bank by reveting it. In disposing of this contention, this Court through Mr. Justice McKenna, refused to determine the right of a land owner to the unrestrained operation of natural forces; but referred in the decision to that "other principle" mentioned by counsel, as a part of the comprehensive rule, that the injury must be the direct and proximate result of the work done by the defendant, or no liability attaches. The Court found, in the Bedford case, that, IN FACT, the injury was not the direct and proximate result of the

construction of the works; that, IN FACT, the only result of the works "was to resist erosion of the banks by the waters of the river" and that the injury was the result of the action of the river through a course of years." The injury was not termed "consequential" because it arose in the prosecution of work, by the Government, for the improvement of the river for navigation; but was so termed because the facts showed that the injury was not the direct and proximate result of the works.

Bedford v. U. S., supra.

In the case at bar "the increased elevation of the flood height * * * is the result of the general confinment of the flood discharge by the Levee System as a whole."

Report M. R. C., 1913, p. 3443.

However, it is not material to the decision of the case at bar to define exactly the reason for designating the injuries in the Jackson case, supra, as "remote or consequential." But it is very important that the Jackson case and the Bedford case, supra, be given their proper places in the realms of riparian law.

It can hardly be inferred and it will not be assumed by counsel, that the Court intended, by the language quoted from the Jackson case, supra, to overrule the Pumpelly case; the Lynah case; the King case; the Sewell case; and all the other cases hereinbefore cited, in which it has been held that the destruction or material impairment of the value of land, as a direct and proximate result of the construction of works by the Government, in aid of navigation, is a

"taking," for which compensation must be paid to the owner of such land.

Appellant, admitting that he has no right, primarily, "to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible," nevertheless asserts that when "progress and development," in the exercise of the power of Eminent Domain, "take" appellant's property, the duty to make compensation attaches inevitably.

COMPENSATION.

XI.

No provision for compensation is made by the State Acts for the land of appellant; and such provision is an indispensable requisite to their constitutionality.

Sweet v. Rechel, 159 U. S. 380.
Head v. Amoskeag Mfg. Co., 113 U. S. 9.
Adirondack R. Co. v. New York, 176 U. S. 335.
Cherokee Nation v. So. Kans. Ry. Co., 135 U. S. 541.
Benedict v. N. Y. City, 39 C. C. A. 290.
Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162.
Ex Parte Martin, 13 Ark. 198.
Bloodgood v. M. & H. Ry. Co., 18 Wand. (N. Y.) 9.
Meriwether v. Board of Dir. St. Francis Lev. Dist., 91 C. C. A. 285.

"Compensation must be paid before the property is taken or within a reasonable time thereafter and the making of this compensation must

be as absolutely certain as that the property is taken. It must not be dependent on any hazard, casualty or contingency whatever."

Bloodgood v. M. & H. Ry. Co., supra.

The Constitutional provision requiring compensation is merely declaratory of the Common Law, and the right to compensation was recognized before the Constitution.

Staton v. N. & C. R. Co., 17 L. R. A. 839.
Gardner v. Newburgh, supra.
Withers v. Buckley, 61 U. S. 84.
Kaukena, etc., R. Co. v. Canal Co., 142 U. S. 254.
Sinnickson v. Johnson, 17 N. J. L. (2 Harr.) 129, 245.

The Supreme Court, in the Jackson case, supra, in disposing of the first ground of complaint, said:

"Let us primarily test the merits of the first ground of complaint, that is, the building of levees. It is not averred that the land of the claimants bordering on the east bank of the river in the absence of all levees and in a state of nature would not in seasons of high water, be overflowed; and if it had been so alleged, it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible. When accurately fixed, the complaint is but this, that because the claimants had built a levee for the purpose of protecting their own lands and which answered the purpose if levees were not built by others to protect their lands, actionable injury would be occasioned claimants when anybody else sought to protect his land from overflow,

since to do so would increase the volume of water in the river and raise the floor level to the detriment of claimants."

Jackson v. U. S. ,supra, page 13.

This Court referred to lands situated as is that of appellants in the cases at bar, and, by the slightest extension of the opinion in the Jackson case, might have disposed of the question herein. There is admittedly "no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible." That would be a denial of the Right of Transcendental Propriety or Eminent Domain. This Court, however, did not extend its opinion in that case, so as to include the question of COMPENSATION in the event of a "TAKING" of lands which, in their natural condition, were not subject to overflow and this Court did not discuss the corresponding RIGHT of such land owner to COMPENSATION in the event of a "taking" of his property.

DUE PROCESS OF LAW.

XII.

Taking private property without compensation is a deprivation thereof without due process of law.

Cooley Const. Lim., page 357.
Kaukena Co. v. Canal Co., supra.
Muhlker v. New York & H. R. Co., 197 U. S. 544.
Pumpelly v. Green Bay & M. Co., supra.
Scott v. Toledo, 39 Fed. 385, 1 L. R. A. 688.

STATUTE OF LIMITATIONS.

XIII.

The original bill (page 2 of printed record), alleges that the injuries to appellant's land first occurred during the five years immediately preceding the filing of his suit. The amended bill alleges that such injuries first occurred within one year before the suit was brought.

(Page 13 of printed record.)

The bill further alleges that the injury is a continuing one and will be repeated annually whenever the Mississippi River reaches its high water stage. (Page 9 of printed record.)

The levees are not of such a permanent nature, nor was their construction or maintenance so apparently and necessarily injurious, as to start the operation of the statute of limitations from the time of their construction. They have been washed away and broken annually. (Page 8 of printed record.) Report of Mississippi River Commission for 1913, page 3381.

The appellees have continuously increased and enlarged the levees; and since 1910, they have increased the height thereof from three to five feet. (Page 8 of printed record.) Appellant cannot be charged with knowledge of the height to which the flood waters would rise as a result of the construction of the levees. The appellee Mississippi River Commission, itself, did not know the effect thereof. Their report for the year 1894, page 2713, contains the following statement:

> It is not to be doubted that the immediate effect of the confinement of the flood discharge of the Mississippi by levees is to raise the high water plane. But this increased elevation increases the scouring power of the current and may reasonably be expected to result after a time in an enlargement of the river channel and some consequent lowering of the flood level beneath the heights immediately following complete closure. But to what extent such lowering will take place and when are questions not yet answered by experience and upon which opinions differ."

The same report shows that the exact extent of the increase in the flood heights could not be foreseen by the Commission, at that time, though the levee system had been started more than ten years prior to that date.

Report M. R. C., 1894, page 2713.

The Mississippi River Commission, since the year 1894, has frequently stated that the grade of the levees was above the highest flood stages. As late as 1911 and BEFORE ANY INJURY HAD RESULTED TO THE LAND OF APPELLANTS, it referred to the levee system as though it were practically complete and as though no further increase in flood heights would occur.

Report M. R. C., 1911, page 3185.

This was followed, in the very next year, by a high water stage more than four feet higher than that of any previous year.

Report M. R. C., 1913, page 3439.

In 1913 a further increased high water stage was attained.

Report M. R. C., 1913, page 3443.

Under such conditions the statute of limitations does not begin to run until the injury has been consummated.

King v. United States, 59 Fed. Rep. 9.
U. S. Revised Statutes, 1069.
Sloggy v. Dilworth, 8 A. S. R. 658.
Delaware & Rariton Land Co. v. Wright, 21 N. J. L. 469.
Gould on Waters, Secs. 412, 414.

LACHES.

XIV.

Appellant has not been guilty of such LACHES that a Court of Equity would deny him relief on that ground. In all the cases where it has been held that a complainant was barred by LACHES, there has been an acquiescence in the acts of the defendants, with full knowledge by the complainant of the results of such acts; or there has been an acquiescence in the wrongful possession by the defendant of complainant's land, with full knowledge on the part of complainant, and the courts have properly held that where the complainant so knowingly acquiesced in the wrongful acts or possession of defendant, complainant was estopped from dispossessing him and was LIMITED TO HIS RIGHT TO COMPENSATION.

United States v. Great Falls Mfg. Co., 112 U. S. 645.

Harlow v. C. & W. Canal Co., 18 Ohio St. 179.
New York City v. Pine, 185 U. S. 93, 97.

Appellant had no knowledge or reason to believe that the injury would occur, in the case at bar, until it actually happened and this suit was filed within one year thereafter.

(Page 13 of printed record.)

This assertion of appellant's rights was immediate and prompt after his knowledge of their violation and neither LACHES, ACQUIESCENCE, or ESTOPPEL, can be predicated upon his failure to anticipate injuries which the appellee Mississippi River Commission, itself, did not know would result from the levee.

Reports M. R. C., supra.

It cannot be doubted that, had appellant filed this suit before the increased elevation of the high water stage became sufficient to overflow his land, he would have been met at the threshold of the Court with the contention that: "Your land has not been flooded and you have no cause to anticipate that it will be destroyed."

This idea was expressed by the Supreme Court in the case of Missouri v. Illinois, 180 U. S. 208, quoting with approval, Goldsmid v. Tunbridge Wells Impr. Commrs., L. R., 1 Eq. 161, as follows:

> "If the plaintiff comes to the Court very early, the evidence is that it (the pollution) is not perceptible. 'You have no proof that there is any appreciable pollution and you must wait until it becomes a nuisance.' Then he waits for five or six years, until it is obvious—and then

they say, 'You have come too late, you have allowed this to go on for 20 years, and we have acquired an easement.' "

Missouri v. Illinois, supra.

There can be no legislation by estoppel. Estoppel cannot give validity to void acts.

Ottawa v. Perkins, 94 U. S. 267.
O'Brien v. Wheelock, 184 U. S. 489.

Equity will enjoin a trespass or nuisance such as is alleged where the injury is irreparable and the remedy at law is inadequate, without regard to the solvency of the wrongdoer.

Various contingencies may arise in particular cases, to render the injury irreparable and the remedy at law inadequate:

The injury may be destructive of the very substance of the estate.

It may not be susceptible of estimation in terms of money.

It may be vexatiously repeated or continuous, necessitating a multiplicity of suits.

It may be committed by one who is irresponsible, so that a verdict against him for damages would be entirely valueless.

To exclude the equitable relief, it must appear, not only that there is some remedy at Law; but that it is plain, adequate and complete and as practical to the ends of justice and the prompt administration thereof as is the remedy in Equity.

Belknap v. Belknap, 2 Johns. Ch. (N. Y.) 7 Am. Dec. 526.
Jerome v. Ross, 11 Am. Dec. 487.
Ex Parte Martin, 13 Ark. 198.
Whitfield v. Rogers, 26 Miss. 84.
Coulson v. Harris, 43 Miss. 728.
Armstead v. Loomis, 9 N. Y. 429.
Carlson v. St. Louis R. & Impr. Co., 72 Minn. 128, 41 L. R. A. 371.
Cairo V. & C. R. Co. v Brevoort, 62 Fed. 129, 25 L. R. A. 527.
King v. Steward, 84 Fed. 546.
Hagge v. K. C. S. R. Co., 104 Fed. 391.
Wood v. Braxton, 54 Fed. 1008.
Parker v. Winnipisiogi Canal Co., 67 U. S. 545.
Pennoyer v. McConnaughy, 140 U. S. 1.
Kaukena v. Green Bay & M. Canal Co., 142 U. S. 254.
Sweet v. Rechel, 159 U. S. 401.
Walla Walla v. Walla Walla Water Co., 172 U. S. 12.
Missouri v. Illinois, 180 U. S. 208.
Hopkins v. Clemson Agricultural College, 221 U. S. 646.
U. S. Rev. Statutes, Sec. 723.
2 Story Eq. Jur., par. 925, 928.

Such a suit is not a suit against the State, within the meaning of the eleventh amendment to the Constitution.

Pennoyer v. McConnaughy, supra.
Osborn v. Bank of U. S., 9 Wheat. 738.
Hopkins v. Clemson Agric. College, supra.
Smith v. Ames, 169 U. S. 466.

The case of Hopkins v. Clemson Agric. College, supra, was decided as late as the year 1910. The facts therein and the allegations in the case at bar are identical. In that case the Court said:

> "If the facts hereafter warrant it, the college may be enjoined against further acts looking to the maintenance or reconstruction of the dyke."

Hopkins v. Clemson Agric. College, supra.

The threatened loss of his land is the irreparable injury and it matters not how solvent he may be who seeks to take it or transfer it to the public use, the courts will protect the possession of the owner.

Carpenter v. Grisham, 59 Mo. 247.
Mason City v. Mason, 23 W. Va. 211.
Erwin v. Fulke, 94 Ind. 223.

> "The owner is entitled to reasonable, certain and adequate provision before his occupancy is disturbed."

Sweet v. Rechel, supra.

In Ex Parte Martin, supra, an Arkansas case, the Court issued a mandatory injunction, requiring that a gap be left in the levee, where no provision had been made for the compensation of a land owner whose land was being flooded, by the waters obstructed by the levee.

Ex Parte Martin, supra.

In Parker v. Winnipisiogi C. & W. Co., supra, Mr. Justice Harlan said:

> "When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair or beyond the possibility of compensation in damages; but it may be of such con-

> stant and frequent recurrence that no fair or reasonable redress can be had therefor in a Court of Law."

The defense made by the Government in the Court of Claims, in the case of Jackson v. United States, supra:

> "That the public works complained of were constructed by the co-operation of the United States and the various local authorities, with no means at hand to ascertain the extent of their respective liabilities,"

if constituting a valid defense, is alone sufficient to render the remedy at Law inadequate, in the case at bar.

BALANCE OF INJURY.

XV.

The rights of appellant are not to be determined by the "Balance of Injury." The continuance of a nuisance will not be sanctioned because appellant's injury is comparatively inconsiderable or because an injunction might cause great loss or expense to the wrongdoers. The interests of individuals are not only compatible with, but identical with the interests of the public.

Suffold Min. Co. v. San Miguel Co., 9 Col. App. 407.
Missouri v. Illinois, supra, page 246.
Gould Waters, par. 546.
Wood, Nuisances, 3d Ed., pp. 1151, 1183.
Corning v. Troy Nail Factory, 40 N. Y. 207.
State of Penn. v. Wheeling Bridge Co., 54 U. S. 565.

In the case of Jackson v. U. S., supra, the claimants were met in the Court of Claims with the contention that the granting of relief to the class of claimants whose lands were similar to those in the Jackson case, would subject the Government to an "immeasurable responsibility." The injuries to lands for which relief is sought in the class of cases at bar, on behalf of which the suit at bar was filed, is far less than the value of the lands similar to the Jackson land (page 13 of printed record). But the defense, that appellant and the land owners, in whose behalf he sues, are not entitled to redress because of the small value of their lands, compared with the lands reclaimed by the levees of the appellees, is not consistent with the protestations of "immeasurable responsibility," advanced by the Government in the Jackson case, supra.

ALTERNATIVE RELIEF.

XVI.

Appellant was entitled to relief under his prayer for general relief.

N. Y. City v. Pine, 185 U. S. 93.
N. P. R. Co. v. Smith, 171 U. S. 271.

In the case of New York City v. Pine, supra, a riparian owner sought to enjoin the completion of a dam which would cut off his water supply. The testimony showed that the plaintiff and the city had been trying to agree upon compensation, during the construction of the dam, showing acquiescence by the plaintiff, in the posession and acts of the defendant city of New York.

This Court said:

> "It is one thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it be respected. In the latter case the defendant acts at his peril. In the former he may well assume that the payment of a just compensation will be accepted in lieu of the right."
>
> N. Y. City v. Pine, supra, p. 97.

Appellant in the case at bar, has never waived his right, impliedly or expressly. Nothing ever has been done by him to estop him from demanding that his right be respected. No right was violated until the injury to appellant's land occurred and there was no reason for him to anticipate the violation of his rights, before that time. But even had appellant acquiesced in the acts of appellees, so that the Court would not grant an injunction, primarily; nevertheless, appellant is entitled to compensation and may obtain it in this suit.

In New York City v. Pine, supra, page 104, this Court said:

> "The Court of Equity may take full possession and finally end the controversy, by securing the payment of adequate compensation in lieu of a cessation of the trespass. Pappenheim v. Railway Co., 128 N. Y. 436; Jackson v. Stevenson, 156 Mass. 496, 502. * * * The Court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey (the right). It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay, the injunction issues."

This Court ordered such a decree to be entered in that case.

New York City v. Pine, supra.

TRIAL BY JURY.

XVII.

An alternative decree, such as was ordered in the case of New York City v. Pine, does not constitute a denial of the right to a trial by jury.

New York City v. Pine, supra.
Acme Appliance Co. v. Commrs., 192 Fed. 321.

In McElroy v. Kansas City, 21 Fed. Rep. 257, an injunction was granted with leave to the defendants to apply for the appointment of a board to ascertain the damages which complainant would sustain, upon payment of which, the injunction would be vacated.

See also:

Organ v. M. & L. R. R. Co., 51 Ark. 235.

TRANSFER TO LAW SIDE OF COURT.

XVIII.

The prayer of the bill was amended and the Court below was requested to order a transfer of the case to the Law docket and its trial there as an action at law for damages in the event of a denial of the injunction. (Page 3 printed record.)

Assuming that appellant has a plain, adequate and complete remedy at Law, the Court below erred in refusing to grant appellant's request for such a transfer of his case.

This question, as has been stated heretofore, depends for its determination upon the first assignment of error, to the effect that the allegations of the bill shows a "Taking" of appellant's property, without compensation. (Page 22 of printed record.) That question has been discussed already under the topic "What Constitutes a Taking," supra.

Appellant was entitled to such a transfer.

Equity Rule No. 22.

It is respectfully submitted that the Court below erred, if in no other respect, in failing and refusing to transfer the case to the Law Docket of that Court, for trial there as an action at law, for damages.

PUBLIC POLICY .

XIX.

Public Policy, though favoring the construction of levees for the purposes of the appellees, is not opposed to the compensation of appellants for the taking of his property as a direct and proximate result of such improvements.

Public Policy is determined, primarily, by the Constitution.

Vidal v. Girard's Heirs, 2 How. 127.
Missouri v. Illinois, supra.

The appellee Mississippi River Commission reported, regarding some of the land owners on the east bank of the Misissippi River, whose land was situated as was that in Jackson v. United States, supra, as follows:

> "That these people should be condemned to perpetual inundation without possibility of relief or redress, for the sake of an improvement from which their fellow citizens are enjoying great benefit, is intolerable to any man's sense of justice."

Report M. R. C., 1910, page 2937.

In a prior report they had referred to the injuries to those lands which, in their natural state, were subject to overflow, as in the Jackson case, supra, in the following language:

> "There may be, however, some floods which, unconfined would not overflow them, but which, confined, will overflow them, and the injury in such case would doubtless be of that immediate and proximate character which constitutes recognized ground of legal redress."

Report M. R. C., 1894, page 2715.

That this injury was not of "that immediate and proximate character which constitutes recognized ground of legall redress," was decided in the Jackson case, supra.

A FORTIORI, is it now seemingly malign, to hear that same Mississippi River Commission conend that the injuries to appellant's land, which was above overflow in its natural condition, are Damnum Absque Injuria and that the compensation to which appellant is entitled is against Public Policy or Justice.

Appellant has such abiding faith in the Constitution of the United States and in this Honorable Court, that he is unwilling to believe that justice has become repugnant to the Public Policy of our coun-

try, or that the appellee Mississippi River Commission can now be heard to say that the acts which, in 1910, were "intolerable to any man's sense of justice," have become just and right, because relief is now sought against the Commission itself.

CONCLUSION.

XX.

It is respectfully submitted that the decree of the District Court for the Northern District of Mississippi should be reversed.

BARNETTE E. MOSES,

Solicitor for Plaintiff.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1915

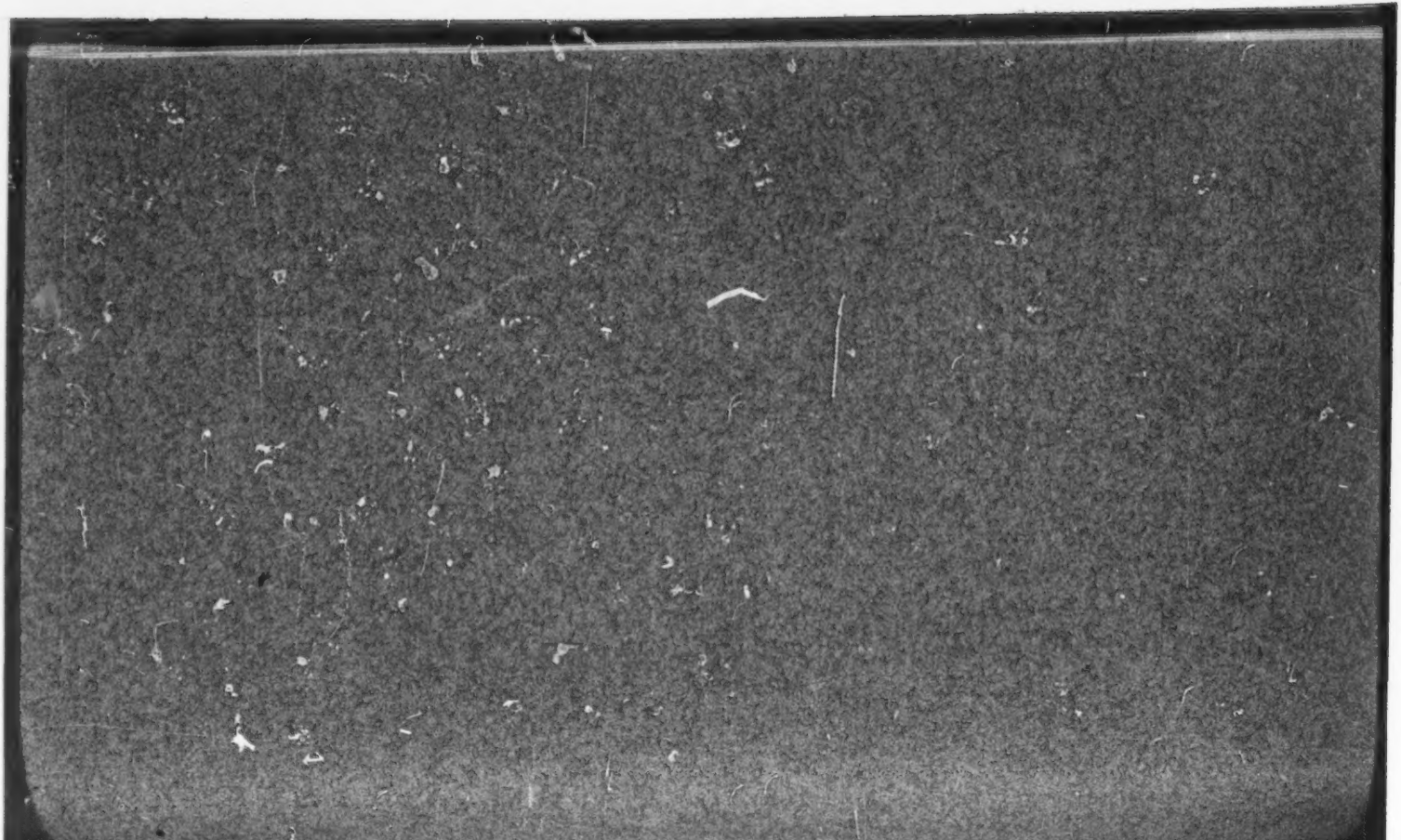
JOHN F. CUBBINS, Appellant,
vs.
THE MISSISSIPPI RIVER COMMISSION and THE YAZOO-MISSISSIPPI DELTA LEVEE BOARD. } No. 299

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DELTA DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI

Statement of Facts and Brief of Counsel for Yazoo-Mississippi Delta Levee Board, Appellee

GERALD FITZ GERALD,
Counsel for Appellee,
Y. M. D. Levee Board

Gazette Print, Clarksdale, Miss.



CASES CITED

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STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the Delta Division of the Northern District of Mississippi, dismissing on motion the bill in equity praying to enjoin the Yazoo-Mississippi Delta Levee Board from maintaining, enlarging or repairing its levee sytem and for damages to complainant's lands alleged to be caused by the entire levee systems maintained by the defendant Yazoo-Mississippi Delta Levee Board, and all other Levee Boards, from Cape Girardeau, Mo., to the Gulf of Mexico, along both banks of the Mississippi River.

The complainant's lands are located in the State of Tennessee. The defendant Levee Board is located in the State of Mississsippi.

The original bill was dismissed upon motion for want of equity. The original bill was then amended and complainant asked a transfer to the law side, but the Court held that no case at law was presented by the pleadings.

The bill alleges, in part,

> "That prior to the construction of the levees and the closing of the natural basins by the defendants, as hereinafter stated, these lands of complainant's were from three (3) to ten (10) feet above the highest flood waters of the Mississippi River, and that said FLOOD WATERS of the said Mississippi River did not overflow the said lands, nor interfere with the use and occupation thereof. But the OUTLETS and DRAINS THROUGH the BASINS before mentioned were such as to accomodate said flood waters and complainant's lands were not subject to over-

flows; the FLOOD WATERS ESCAPING through the natural outlets or CREVASSES into the basins on the west bank of the river, etc."

The bill further alleges that about the year 1883 the defendant Levee Board, and the other Levee Boards under the control of the Mississippi River Commission conspired and confederated together and have lawfully and legally established lines of levees along both banks of the Mississippi River, with certain exceptions stated in the bill, and have CUT OFF THE NATURAL OUTLETS of the Mississippi River, and are now attempting to hold the river within its natural banks. The bill says:

"That the effect of the CLOSING by the defendants of the NATURAL OUTLETS along the said river, and the confining of the flood waters between the levee systems as a whole, is to obstruct the natural HIGH WATERFLOW of the waters of said River in and along its natural bed for its entire length, thereby raising the level of the water to such an extent that said flood waters, WITHIN THE LAST ONE YEAR, have ATTAINED a sufficient height to flow over complainant's land, and WHEN there is now a HIGH WATER stage in said river, the waters of said river accumulate, flow over and remain standing on and over said land of complainant to a depth from four to eight feet, so that complainant is now being INTERRUPTED in the profitable use, occupation and enjoyment of his said lands, and, as a result thereof, said water is being held back by the said levees, so constructed, enlarged and repaired by the defendants, at a higher elevation, as aforesaid, and complainant's said land is being covered with superinduced additions of sand, silt and gravel, etc., etc."

The bill alleges that these injuries constitue a "taking" by the defendant Levee Board, and that under the 5th Amendment of the Constitution of the United States complainant should be paid by all the defendants, or some of them, the sum of Five Hundred Thousand Dollars damages.

Complainant further claims that his property is being taken without the due process of law required by the 14th Amendment of the Constitution of the United States.

ARGUMENT AND BRIEF.

As the bill was dismissed upon motion for want of equity, we shall argue the case as though upon demurrer, admitting all facts stated in the bill to be true, but construing them most strongly against the pleader.

While taking the statements of the original bill as true as to the FACTS stated therein; still the Court will take judicial cognizance of the relation of the Mississippi River Commission to the defendant Levee Board, as shown by 34 Statutes At Large. Page 208, Chapter 2572, and will not hold that the statement of conspiracy and confederation as shown by the bill is true as therein stated except in so far as the statute quoted provides and will not under that statute hold that the Yazoo-Mississippi Delta Levee Board is under the control of the United States Government to such an extent that it can be held the agent of the United States Government.

A demurrer admits the truth of the allegations of the bill, but does not admit conclusions of law therein

set forth; nor does it admit allegations legally impossible or contrary to legislative enactments, or allegations contrary to the common knowledge of men; nor does a demurrer admit matters of inference or argument.

4 Fosters Fed. Practice, P. 474. 869

An averment that injury would be irreparable, is not admitted by the demurrer.

4 Fosters Fed. Practice, P 477

We make this distinction because we wish to claim herein that the Yazoo-Mississippi Delta Levee Board as a Mississippi corporation is, in relation to the appellant, whose lands are in Tennessee, as that of a person protecting his life and property from destruction without intentionally or willfully causing harm to appellant.

Complainant's bill says:

> "Complainant realizes and understands fully the great worth and public utility and the object for which the same (levees) are being projected, and the great benefit to the people as a whole to be derived from an accomplishment and the successful achievment of such purposes."

In this statement complainant admits inferentially the well known facts that the Mississippi River when allowed to flow at will over the vast basins of its delta, is a common enemy to the Government and the people and is dangerous to both health, life and property.

As said by Chief Justice Shiras, in Leovy vs United States, 77 U. S., p. 621,

"The Court may take judicial notice that the public

health is deeply concerned in the reclamation of swamp and overflowed lands."

Being a "dangerous common enemy" the Levee Boards or any other private persons have a right to combat it by holding it within its natural banks without liability to other persons injured in consequence thereof.

The principle of self defense applies to persons, commonwealths and nations:

Rex vs Commissioners. 8 Barn. & Cres. p. 355
Bowditch vs Boston, 101, U, S., p. 16
Hoard vs City of DeMoines, 62 Iowa, p. 326
S. & B. Turnpike Co, vs Green, 99 Ind. p. 205
C. & V. R. R, Co., vs Stevens, 73 Ind. p. 283
DuBose vs Levee Commissioners, 11 La. Ann. p. 165
Bass vs State, 34 La. Ann. p. 165
Farnum on Waters Sec. 357, p, 1340.

"It is not averred that the lands of the claimant's bordering on the east bank of the river, in the absence of all levees and in a state of nature, would not in seasons of high water be overflowed; AND IF IT HAD BEEN SO ALLEGED, IT IS CERTAIN there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

Jackson vs U. S., 230 U. S. p. 1

"If the waters of the Mississippi River, which at flood times spread in width from twenty to forty miles, and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of a whole stream, and the whole valley is to be given up as the courseway of the stream, the most

fertile portion of our state may at once be abandoned. From Memphis to Vicksburg, and from the foot hills to the river, there is not a square yard of land that was not deposited by the overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel the whole valley is the channel. It is evident that to so declare would be to announce as a positive rule of law and as an indisputable fact, that which is not true, and which, if put into practical operation, would relegate prosperous and fertile districts to a condition of wilderness. There are farms innumerable, and railroads, villages, towns and cities situated in a water course, if the usual flow of the flood waters of the Mississippi River mark and define the course of that stream. It is manifest that to apply the strict rule of law controlling in such cases of streams and the obstructions thereof to such river and to such condition is, in the very nature of things, impracticable and impossible."

Kansas City M. & B. R. R.. vs Smith, 72 Miss. 677
Lamb vs Reclamation District, 74 Cala. p. 135
McCoy vs Board of Directors of Plumb Bayou
Levee District, 95 Ark. p. 352.

It is held in all of the above cases that the damages to and destruction of property consequent upon the repelling and combatting of a common enemy is not a taking of private property for public use in contemplation of the 5th Amendment to the Constitution of the United States and of the constitutional provisions of like nature of the different states.

In these cases the common law adopts the principles of natural law and finds the right and justification in the same imperative necessity.

Counsel for appellant cites the case of Eldridge vs. Trezevant, 160 U. S.. p. 452, as holding that the case of Bass vs. State, 34 La. Ann., p. 494, would be a wrong construction of the Constitution of the State of Louisiana, (which Constitution provides for compensation for property taken for public use) were it not for the fact that the Court of Louisiana in the Bass case must have decided that case on the theory of the CIVIL LAW, recognizing the servitude of the land to public use. The case of Eldridge vs. Trezevant, supra, does not decide any such thing. It simply construes the decision in the Bass case on a different ground than Police Power. Counsel fails to take into consideration that the Bass case involved an actual taking of the property and not a constructive one; and further, that the injury suffered therein was not a consequential injury caused by the combatting of a common enemy. The contention that the civil law differs in any great respect from the common law, is not sound. The leading authorities of the Courts of the United States, and of most of the States, and of Great Britain, hold that the title to shore lands, swamp lands, and overflowed lands, is in each State, subject at all times to the servitude of the Government for regulation and improvement of commerce.

If this were not so why the different constitutional provisions providing for compensation for land taken for public use?

The building of a levee is within the principal which justifies the taking or destroying of private property to prevent the spreading of a fire, the ravages of a pestilence, the advance of hostile army, or any other great public calamity. "NECESSITAS PUBLICA."

Taking the view that the building of the levee by the defendant, the Yazoo-Mississippi Delta Levee Board, was its own individual effort to combat a dangerous common enemy. and not the acts of the United States Government, the Fifth Section of the Constitution of the United States has no bearing. It is settled by this Court, in decisions too numerous to cite, that the 5th Amendment of the Constitution of the United States has aspect only to a taking by the United States Government, and does not include the taking by a State or persons.

The land of appellant being. as aforesaid, in the State of Tennessee and the defendant Levee Board being in the State of Mississippi, the Constitution of neither State would effect the law in the case, and the common law. as construed by the Supreme Court of the United States, would apply. And if the Supreme Court of the United States should hold that the combatting of this dangerous common enemy was a right inherent in the defendant Levee Board, the 14th Amendment of the Constitution, with reference to due process of law, would be met by the common law.

IS GOVERNMENT LIABLE?

Conceding, for the moment, purely for the sake of argument, that the defendant Levee Board is under the control of the United States Government, and is its agent. Is the United States Government liable under the circumsances of the instant case for the destruction of complainant's property?

Complainant in his brief concedes the full right of the Government to make the improvements, and we

will not trouble the Court with citations on this point.

Complainant relies upon the two cases of Pumpelly vs. Green Bay and M. Canal Co., 80 U. S., p. 166, and U. S. vs. Lynah, 188 U. S., 445. In doing so he is met squarely with the two cases of Bedford vs. the United States, 192, U. S. p. 217, and Jackson vs. United States, 230 U. S., p. 1.

The Pumpelly case, supra, was decided upon the following facts:

> "The Green Bay & Miss. Canal Co., ERECTED A DAM across the Fox River, the northern outlet of Lake Winnebago, raising the water of the Lake so high as to forcibly and with violence overflow six hundred forty-nine acres of Pumpelly's land, the water coming with such violence as to tear up his trees and grass by the roots. etc."

The Lynah case, supra, involved these facts:

> The United States Government, for the purpose of deepening and enlarging the channel of the Savannah River, for navigation purposes, placed in that river certain DAMS; training walls, jetties, etc., which caused the water to flow back directly on claimant's land and to make of it an irreclaimable bog.

In the Jackson case, supra, the facts were substantially:

> Claiment's lands were "comparatively high and secure from overflow." In 1883 the United States built a line of levees (being the identical line of levees along the west and east bank of the Mississippi River involved in the instant case,) and such

> levees, when so built, obstructed the flow of the water at flood stage in the Mississippi River and did not allow it to escape over and through the different basins and crevasses through which naturally it had flowed. That the building of said levees caused the waters of the river to rise higher than ordinary and overflow the plaintiff's lands and ruin them. Before the building of the levees by the United States, claimant's lands were protected from extreme flood by small private levees.

In the Bedford case, supra;

> The Mississippi River broke through a narrow neck of land at DeSoto Point, near Vicksburg. The banks at the cut-off were rapidly eroding and if the natural action of the river had been allowed to continue claiment's land would have probably been undisturbed. The Government revetted the banks on the east side of the cut-off and this revetment held the current steadily across the river upon complainant's lands, and in the course of a few years they were destroyed.

There are several fundamental points of difference between the Pumpelly-Lynah cases, relied upon by appellant in the instant case, and the Bedford-Jackson cases, relied upon by the appellees.

These points of difference occur to us as:

1st. The Pumpelly-Lynah cases involve improvements for commercial activities; the Bedford-Jackson cases involve a fight for protection against an enemy to the public.

2nd. The Pumpelly-Lynah cases involve the placing of obstructions in the river itself, and the immedi-

ate and forcible back flow of the water over complainant's lands, and its immediate destruction; the Bedford-Jackson cases involve the building of barriers along the banks of the river to keep the river in its natural banks, and the consequent rise of water over claimant's lands after a period of time and their damage during flood stage.

The Jackson case and the case at bar are identical in all the facts with the single exception that it is stated in the Jackson case "Claimant's lands were comparatively high and secure from overflow." While in the instant case complainant alleges that his lands, prior to the construction of the levees, "were from three to ten feet above the the highest flood waters of the Mississippi River."

Appellant, recognizing the very small difference in the facts and law between the Jackson case and the case at bar, says in his brief (p. 34):

> "This court (in the Jackson case) has reference to lands situated as is that of appellant's in the cases at bar and by the slightest extension of opinion in the Jackson case might have disposed of the question herein."

In admitting that the facts in the Jackson case are identical with those in the case at bar, with the exception as stated, that the claimant's in the Jackson case had erected a small private levee which protected their lands from highest flood stage, appellant founds the basis for the whole decision in the Jackson case on the single fact that the building of the small private levee by claimant was in the nature of a waiver to com-

plain or an estopped on the part of claimant.

An analysis of the opinion of Chief Justice White in the Jackson case will show clearly that the case was not founded upon any such consideration. The mention of the building of the small private levee was only made to illustrate clearly the right of a person in such case to protect his land from such inroads by the high flood stages of the river. If this is not so, what can possibly be meant by the statement made in the case by Justice White.

> "It is not averred that the lands of claimant bordering on the east bank of the river, in the absence of all levees, and in a state of nature, would not, in seasons of high water, have been overflowed; AND IF IT HAD BEEN SO ALLEGED IT IS CERTAIN there would be no right on the part of an individual to insist that primitive conditions should remain, etc."

Also,

> "We therefore come to consider the proposition in that aspect. In doing so, however, it is to be observed that even if all the previous considerations which we have stated, concerning the non-liability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, etc."

It seems to us that the Jackson case holds directly that the Jacksons had the legal right to build their private levee to protect their property from the high flood stages of the water, and that likewise the United States had the right to build its levees to protect the lands from the high

flood stages of the water, and that neither would be liable for the consequential injuries caused to other persons, either proximate or remote.

But, appellant says (brief p. 32.)

> "Appellant, admitting he has no right, primarily, to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible, nevertheless, asserts that when 'progress and development,' in the exercise of the power of eminent domain, 'take' appellant's property the duty to make compensation attaches inevitably."

As an abstract proposition of law, appellant is right, but, on the other hand, we insist that when "progress and development," not in the exercise of eminent domain, but in an effort to combat the dangerous and troublesome "Father of Waters" from destroying life and property, causes consequential injuries to ones property he can claim no compensation therefor.

> Jackson vs. United States, 230 U. S. p. 1.
> Bedford vs. United States, 192 U. S., p. 217.
> Hughes vs. United States, 230 U. S., p. 24.
> Gibson vs. United States, 166 U. S., p. 272.

It is insisted by appellant that the statement made by Chief Justice White in the Jackson case, that no person has the right to insist that primitive conditions be suffered to remain, does not mean that the Jacksons would not be entitled to compensation for their lands damaged by an effort to "progress and develop." Counsel evidently overlooked the fact that this very point was decided in the Jackson case, for the Jackson case was in the Court of Claims for no other purpose than to recover damages, and was not an attempt to stop "progress and develop-

ment" by an injunction as in the instant case. The language used in the Jackson case is careful and accurate, and can not be misconstrued by the Court.

It is urged by appellant in his brief that the Jackson case and Bedford case did not overrule the Pumpelly case and the Lynah case, but, upon a careful reading of the dissenting opinion of Chief Justice White, in the Lynah case, we believe that the Jackson case was decided upon the exact principles announced in the dissenting opinion of Justice White in the Lynah case. Counsel for appellants in the Jackson case, like counsel for appellants in the instant case, relied on the Pumpelly and Lynah cases.

In our opening statement herein we have italicized some of the facts as alleged and admitted in the complainant's bill in order to call the Court's attention especially to those points, to-wit:

1st. The Levees complained of were built in 1883, and the injuries occurred in 1911;

2nd. The injuries complained of are not caused by obstructions IN THE RIVER, but are caused by a stopping up of the basins and outlets and drains and crevasses through which the river flowed at flood stage.

3rd. The security of appellant's lands depended upon this: "the outlets and drains through the basins aforementioned, were such as to accomodate said FLOOD WATERS, and complainant's lands were not subject to overflows: the FLOOD WATERS ESCAPING, as aforesaid, through the natural outlets or crevasses into the basins on the west bank of the river, etc., and the building of the levees "cut off the natural outlets."

4th. The effect of the building of the levees was to confine the flood waters and to raise the level of the water so that WHEN there is a "high water stage" in said river the waters of said river accumulate, flow over and remain standing upon the lands of complainant to a depth of from four to eight feet so that complainant is now being INTERRUPTED in the profitable use, occupation and enjoyment of his said lands

This state of facts undoubtedly shows a case of consequential injury.

Gibson vs. United States, supra;
Bedford vs. U. S., supra;
Jackson vs. U. S., supra;
Transportation Co., vs. Chicago 99 U. S. 635.

TRANSFER TO LAW SIDE OF COURT

The bill in equity as amended did not present a case at law as against appellee, and even if it had the Court could have determined in this suit the matters of law according to the principals applicable without sending the case or question to the law side of the Court.

Equity Rule 23.

CONCLUSION

It is respectfully submitted that the decree of the District Court for the Delta Division of the Northern District of Mississippi in the above styled cause should be affirmed.

GERALD FITZ GERALD.
Counsel for Yazoo-Mississippi Delta Levee Board, Appellee.

FILED
APR 22 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

JOHN F. CUBBINS, *Appellant*,
vs.
THE MISSISSIPPI RIVER COMMISSION AND THE YAZOO-MISSISSIPPI DELTA LEVEE BOARD.

No. 299.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Reply Brief of Counsel for Appellant

BARNETTE E. MOSES,
Attorney for Appellant.

Supreme Court of the United States

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REMEDY AT LAW INADEQUATE.

The remedy of appellant against the Government, in an action at law, is not adequate. The allegations of fact in the bill show that the public works complained of were constructed by the co-operation of the Mississippi River Commission and the various local levee boards. (R., page 7.)

In the case of Jackson vs. United States, 47 C. Cls., 611, the defendant interposed two defenses: "First, that the damages accruing were consequential in character, and second, **that the public works complained of were constructed by the co-operation of the United States and the various local authorities, with no means at hand to ascertain the extent of their respective liabilities.**"

Conceding that the second contention of the Government in that case is correct, appellant says that no provision has been made by any act of Congress conferring jurisdiction on the Court of Claims to try a suit and to allow damages against the Government, where, as in the case at bar, the officers and agents of the Government co-operate with another person in the construction of public works which result in the "taking" of private property.

Judicial Code, Chapter 7, Section 145.

REPEATED INJURIES.

The allegations of the bill show that plaintiff's land is 700 feet in length and that parts of it are higher than other parts. The allegations of the bill, that the injuries will be repeated, are consistent with the contention that a completed taking has already resulted, since the taking of a part of appellant's land and the absolute destruction of some of the houses thereon, does not preclude the subsequent "taking" of other portions of his land as a result of the recurring and repeated overflows.

EXTRAORDINARY FLOODS.

The allegation of the bill that before the construction of the levees appellant's land was above the highest flood heights of the Mississippi River, ordinary or extraordinary, and that the injuries are the result of the construction, enlargement and increases in height of the levees by the appellees, excludes the suggestion made by the appellee, Mississippi River Commission, that the injuries may be the result of extraordinary floods.

THIS IS NOT A SUIT AGAINST THE UNITED STATES

The bill alleges that the appellees are engaged in acts that are unconstitutional and such as could not be authorized by Congress or by the state legislature.

A suit to enjoin such acts is not a suit against the United States.

Hopkins vs. Clemson Agricultural College, 221 U. S., 646.

THE GENERAL LAW GOVERNS.

The cases of St. L. S. W. Ry Company vs. Miller Levee District, 201 Fed., 823, and C. B. & Q. Ry. Company vs. Ill. Com., 200 U. S., 562, did not overrule and are not in conflict with the case of C. V. & C. Ry. Company vs. Brevoort, 62 Fed., 129. The former cases were decided upon principles controlled by the local law; the latter case upon principles of general law.

Counsel for the appellee levee board contends that the Mississippi River is *sui generis*. It is respectfully submitted that this river is not of such a character as to remove it and those engaged in works for the aid of navigation thereon and the reclamation of lands near it, from the application of the fundamental principles of general law.

BARNETTE E. MOSES,
Attorney for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

JOHN F. CUBBINS, APPELLANT,
v.
THE MISSISSIPPI RIVER COMMISSION ET AL. } No. 299.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLEE MISSISSIPPI RIVER COMMISSION.

STATEMENT OF THE CASE.

This is one of a series of four suits in equity brought by John F. Cubbins against the Mississippi River Commission and various State levee commissions to restrain the construction and maintenance of the levees on the Mississippi River. Nos. 39, 109, and 118, now pending in this court, are appeals from judgments of the District Courts of the United States for the Western District of Tennessee, for the Eastern District of Louisiana, and for the Eastern District of Arkansas, respec-

tively, each dismissing complainant's bill. The bills in each case are substantially the same. Inasmuch as the records are not printed, and briefs have not been filed in Nos. 39, 109, and 118, it is presumed that they will be dismissed in accordance with Rule 10, paragraph 2.

The statement of the case by counsel for the appellant is correct. It may be added, however, that although not all served, the following State Levee Commissions were alleged to be parties in the bill for injunction: The St. John Levee and Drainage District of Missouri; the St. Francis Levee District of Missouri; Levee District No. 1 of Mississippi County, Missouri; the Cotton Belt Levee District No. 1; the Board of Directors of St. Francis Levee District; the Desha Levee Board; the Chicot County Levee Board; Lake County Levee Board; the Yazoo-Mississippi Delta Levee Board; Board of State Engineers of Louisiana; Ponchartrain Levee District; Lake Borgne Levee District; Orleans Levee District; Grand Prairie Levee District; Plaquemines Parish, East Bank Levee District (R. 2–5).

The measure of relief prayed for is startling (R. 10):

> Complainant prays the court to grant him a writ of injunction, enjoining and restraining the said Mississippi River Commission * * * from constructing, maintaining, enlarging or repairing any levee or levees along the said Mississippi River.

Complainant contends that as riparian owner he has a right to have the Mississippi River flow past his premises in a course not unreasonably different from that in which it was wont to go; that by reason of the construction of the levees the river is annually overflowing and depositing silt and gravel upon his premises to such an extent as to render them worthless; that this amounts to a taking and is a direct result of the construction of the levees; that if he is not entitled to relief in equity, the case should be transferred to the law side of the court for recovery of damages.

The Government insists that appellant's case at law and in equity is wholly without merit; that the controlling principles of law are settled against him by previous decisions of this court.

ARGUMENT.

I.

Complainant's bill is altogether lacking in equity.

1. If the plaintiff is entitled to any relief, his remedy at law is adequate. If the acts of the Mississippi River Commission, done under the authority of many statutes of Congress, amount to a taking of appellant's property, for which the United States is liable, damages may be recovered either in the Court of Claims or in a competent district court. *United States* v. *Lynah,* 188 U. S. 445. The Constitution does not require prepayment prior to taking possession. *Williams* v.

Parker, 188 U. S. 491; *Manigault* v. *Springs,* 199 U. S. 473, 485; *Crozier* v. *Krupp,* 224 U. S. 290, 306. There is nothing unique in the character of complainant's land which would make his damages, if any, irreducible to a money basis.

Parenthetically, with reference to damages against the State commissions, the language of Judge Trieber in *Cubbins* v. *Mississippi River Commission* (204 Fed. 299, 306) may be quoted:

> * * * The claim that the levee districts have expended all of their funds in constructing and maintaining levees, and for this reason are insolvent, is disposed of by the fact that there is in every act of the legislature of the State of Arkansas under which these districts have been created a provision for the assessment of taxes on all lands comprising each district, so that any judgment recovered against the district may be collected by levying and collecting the taxes on these lands, and, if the commissioners fail to levy such tax to satisfy any judgment recovered against it, they may be compelled to do so by writ of mandamus issued by the court which rendered the judgment.

2. The suit in equity is one against the United States to which it has not consented. *Louisiana* v. *McAdoo,* 234 U. S. 627. The Mississippi River Commission is organized under act of Congress and is acting pursuant to its statutory authority. Act of June 28, 1879, c. 43, 21 Stat. 37; act of

March 2, 1907, c. 2509, 34 Stat. 1073, 1103; act of October 2, 1914, c. 313, 38 Stat. 725, 726; act of March 4, 1915, c. 142, 38 Stat. 1049, 1050, 1054. One of the high functions of the National Government is to improve its great watercourses for navigation and commerce. This suit has for its precise object the cessation of work by Federal agents directed to that end.

3. To prohibit le ee maintenance would result in so great detriment to the public interests that, regardless of the merits of the complaint at law, no court would issue injunction. *Beasley* v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 497, 498. As said by Judge Trieber in the *Cubbins* case, *supra* (pp. 307, 308):

> * * * If it appears that the granting of the injunction, although plaintiff may be ordinarily entitled to it, would inflict such great damage on the defendants or the public that that suffered by the plaintiff, if the injunction is refused, will be relatively insignificant, an injunction must be refused. New York City v. Pine, supra; Kansas v. Colorado, 206 U. S. 46, 117; 27 Sup. Ct. 655, 51 L. ed. 956; McCarthy v. Bunker Hill, etc., Co., 164 Fed. 927, 92 C. C. A. 259; Schubert v. Woodward, 167 Fed. 47, 54, 92 C. C. A. 509; In re Arkansas Railroad Rates (C. C.), 168 Fed. 720, 722. * * *
>
> It is a well-known fact that since the construction of these levees millions of acres of swamp lands and lands subject to

> annual inundation have been reclaimed and have become the homes of hundreds of thousands of citizens. What was theretofore a wilderness has been made into a garden spot. To do away with the levee system at the present time would destroy these lands, and make the inhabitants of that country homeless. No court of equity would be justified in lending its aid when such results would necessarily follow.

4. It seems that complainant should be barred for laches. *New York City* v. *Pine,* 185 U. S. 93. It is of the entire levee system that he complains. Work on the system was begun in 1883 (R. 7). Millions of dollars have been expended thereon since that time,—$77,058,147 to June 30, 1915. House Doc. No. 91, 64th Cong., 1st sess., pt. 3, p. 3488.

5. The complainant alleges that unless equitable relief is afforded he will be involved "in an interminable multiplicity of suits" (R. 9). In reality this suggestion is destructive of his entire case. He states that the injury will be a continuing one and will be repeated annually (R. 9); and that attempt to recover damages in a court of law would involve him in multiplicity of suits. Only if the annual recurring injury does not amount to a practical ouster or entire destruction of the value of complainant's premises, would he be compelled to sue for damages more than once. But if the injury is only temporary, and the occupation not perma-

nent, there is no taking. For trespasses or torts, the commission representing the Government, in the scope of its authority, is not liable, either at law or in equity.

II.

Complainant is entitled to no recovery at law, because his damages are remote and consequential. The authorities are conclusive.

There is no distinction between the present case and the cases of *Jackson* v. *United States,* 230 U. S. 1, and *Hughes* v. *United States,* 230 U. S. 24. Although complainant attempts to distinguish the *Jackson* case, saying nothing of the *Hughes* case, in reality he is asking that these cases be overruled. The Government submits that the cases are well considered, the rules announced are sound and should be followed.

No part of complainant's premises are invaded or occupied by the Government in any way. No levee construction work was performed on his land and no Government agent has ever set foot thereon.

To constitute a taking within the meaning of the Fifth Amendment, if the Government does not directly occupy the land there must be such a direct invasion, *e. g.,* by overflowing, as to destroy permanently any beneficial user. The Constitution imposes no liability for temporary damage. *Gibson* v. *United States,* 166 U. S. 269. See *Willink* v. *United States,* No. 180, October

term, 1915; opinion April 3, 1916. In *Transportation Co.* v. *Chicago,* 99 U. S. 635, in denying recovery for temporary damage, this court said (p. 642):

> * * * But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. * * * The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company,* 13 Wall. 166, and in *Eaton* v. *Boston, Concord & Montreal Railroad Co.,* 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession.

See approval of this language in *Gibson* v. *United States, supra,* pp. 275, 276, and *Scranton* v. *Wheeler,* 179 U. S. 141, 154.

It is doubtful if the facts alleged in the bill of complaint present a case of permanent occupation. It is alleged that the injury is a continuing one. Complainant says (R. 9):

> * * * for the said injuries complained of, so being done to his said lands, he says that such injury is a continuing one, and will be repeated annually whenever the Mississippi River reaches its high-water stage, and

> that any attempt by complainant to recover damages in a court of law from any or all of the defendants for such continuous and repeated injury to his said lands, would involve complainant in an interminable multiplicity of suits.

To warrant recovery, moreover, there must not only be an invasion and ouster, but this must be due directly and not remotely or consequentially to the levee system. In *Bedford* v. *United States,* 192 U. S. 217; *Jackson* v. *United States,* 230 U. S. 1, and *Hughes* v. *United States,* 230 U. S. 24, there was a practical permanent ouster, but recovery was denied because the injuries were only remotely due to the levees.

However the damage to complainant's land be regarded, whether temporary or permanent, it is certainly only remotely and consequentially due to the levee system. The higher flood level has not been alleged to be due to any particular levee, but to the system as a whole. This system has been extended gradually since 1883. What part of the higher flood level is due to any particular levee it is impossible to say. The system has been constructed not only by the national authorities but also by State boards and commissions cooperating. Originally the bill alleged that the raising of the level of the water " within the last five years " had been so great as to flow over complainant's land at high-water stages (R. 8, 9). By amendment it is alleged that the damage occurred within the last one year (R. 13). There is thus

in point of time not such direct and immediate connection as is requisite. Moreover, if a levee or dike had been constructed by complainant in front of his own land no damage would have resulted. The grievance thus, as said in the *Jackson* and *Hughes* cases, in final analysis may be said to be not the levee system, nor indeed the waters of the river, but more especially the lack of levee protecting complainant's land, in connection with many other diverse and long antecedent causes. If damages were recoverable against a private riparian owner, the measure would be not the value of plaintiff's land destroyed but the cost of a levee to protect it. But, as said in the *Hughes* case, even against a private riparian owner damages could not be recovered. 230 U. S. 32.

The complaint, furthermore, does not negative the possibility that the high flood waters which overflowed the complainant's lands were so extraordinary for the period complained of as to be properly deemed *vis major,* and hence not due to the levee system at all. This possibility is suggested as not improbable by complainant in his brief as follows (p. 36):

> The Mississippi River Commission, since the year 1894, has frequently stated that the grade of the levees was above the highest flood stages. As late as 1911 and *before any injury had resulted to the land of appellants,* it referred to the levee system as though it were practically complete and as though no further increase in flood heights would occur.

The attempted distinction of the *Jackson* case by appellant on the ground that in that case the complainant had erected a levee to protect her own ground and consequently was estopped to assert the illegality of levees constructed by other parties seems hardly worth considering. A complainant is not barred from seeking relief against the wrongful acts of others, because still others may have a like ground of action against himself.

The only other ground of distinction asserted by appellant is that in the *Hughes* and *Jackson* cases the land was subject to recurrent overflows prior to the construction of the system, whereas in this case complainant's land prior to the construction of the levee system was not touched even in high-flood times. Just how far from the river complainant's land is does not appear from the record. But throughout his brief counsel treats the land in question as riparian. There is therefore no difference in principle. Since riparian, the land, contrary to appellant's contention, is subject to the superior rights of the Government when exercising its function of improving commerce and navigation. The trespasses on complainant's land, due to overflow of the river occasioned by governmental work in improving navigation, are such incidental injuries as riparian land is inherently subject to without compensation. See *Willink* v. *United States, supra; Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251.

It would seem that these principles were settled for all time by the comprehensive opinions in the *Bedford, Jackson,* and *Hughes* cases. Indeed, while the land in the *Jackson* and *Hughes* cases was subject to intermittent overflows prior to the construction of the levee system, these were infrequent and did not prevent the beneficial use of the land. 230 U. S. 11. In the *Hughes* case the findings stated (230 U. S. 28):

> Prior to 1898 said lands (Timberlake plantation) were comparatively high and secure from overflow by the flood waters of the Mississippi River except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value.

And the express language in the *Jackson* case covers the case at bar. The present Chief Justice said (230 U. S. 20):

> Let us primarily test the merits of the first ground of complaint, that is, the building of levees. It is not averred that the land of the claimants bordering on the east bank of the river in the absence of all levees and in a state of nature would not in seasons of high water, be overflowed; and if it had been so alleged it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

Four district courts have held that there is no merit in this complainant's case. In the first case, Judge McCall regarded the *Jackson* case as conclusive and referred to the quotation from the langauge of Chief Justice White just made. (Record in No. 39). Judge Foster quoted the same language in his opinion filed September 16, 1913 (Record in No. 109). He said (*infra*, p. 19):

> * * * The remarks of the learned Chief Justice quoted dispose of the only difference between the case at bar and the one considered by the Supreme Court. Therefore the demurrers will be sustained and the bill dismissed.

These opinions of the District Judges do not appear in the Federal Reporter and are printed as Appendices herewith. They are taken from the original manuscript records in this court in Nos. 39 and 109. The opinion in manuscript record No. 118 of Judge Trieber may be found in 204 Fed. 299, and the opinion of Judge Niles in No. 299 appears in the record at bar on page 14.

CONCLUSION.

The judgment of the District Court dismissing the bill should be affirmed.

JOHN W. DAVIS,
Solicitor General.

ROBERT SZOLD,
Attorney.

APRIL, 1916.

APPENDIX "A."

OPINION BY JUDGE McCALL IN CUBBINS v. MISSISSIPPI RIVER COMMISSION ET AL. RECORD IN NO. 39, OCTOBER TERM, 1915.

MEMORANDUM OPINION ON MOTION OF MISSISSIPPI RIVER COMMISSION, E. M. MARKHAM AND CLARKE A. SMITH, TO DISMISS THE BILL.

Filed July 10, 1913. A. G. Mathews, Clerk.

This case is before me upon a motion of the defendants, the Mississippi River Commission, E. M. Markham and Clarke A. Smith, to dismiss the bill. Seven grounds are assigned as a basis for said motion:

1. That the things complained of in the bill have been done and are being done with a view and purpose of improving the navigation of the Mississippi River and promote the facilities of commerce and as an aid to commerce and navigation, and whatever injuries have come to the plaintiff are the natural results of such improvements, and are consequential in character and are *damnum absque injuria.*

2. That the allegations in the bill do not set forth facts to sustain the plaintiff's contention that the property is being taken in violation of the constitutional rights of plaintiff.

3. That the plaintiff has a complete, full and adequate remedy at law.

4. That the plaintiff has been guilty of such laches as will prevent a court of equity granting the relief sought.

5. That the plaintiff's case or right of action, if any be had, is barred by the statutes of limitations of three, seven and ten years.

6. That the plaintiff is estopped from having the relief sought on account of the nature of the things and matters alleged in the bill, because more than ten years and more

than twenty years the complainant and his predecessors in interest and in title, have known of the improvements in the Mississippi River, complained of in the bill by the construction and building of levees.

7. That the injury complained of is insignificant as compared to the great and irreparable injury to defendants, and the public which would inevitably be occasioned by granting the relief sought, and that a court of equity would refuse such relief.

The bill is filed to enjoin these defendants and their codefendants, and their officers, agents, members, employes, contractors, and associates named in the bill, or described as being unknown to the plaintiff acting by and through or under the authority of or association with the said Mississippi River Commission, or any of the defendants, from constructing, maintaining, enlarging, or repairing any levee or levees along the Mississippi River, and for such relief in the premises as the nature and circumstances of the case may require.

Practically the same question now before the court was presented to it by the other of the defendants at the last term of the court. An order was entered, disallowing the motion. The same conclusion would perhaps be reached now but for the fact that the Supreme Court of the United States, on June 17, 1913, in the case of Mattie W. Jackson et al. against United States, handed down an opinion, which is determinative of the question now under consideration, and that, too, contrary to the action of this court in disposing of this same question at the last term.

I deem it unnecessary to state the history of the origin and development of the levee system along the Mississippi River, or its purposes. That is fully stated in the Mattie W. Jackson case, supra, and for all practical purposes is the same historical statement as set forth in the bill before me.

In that case it appeared that the plaintiff's land on the east bank of the Mississippi River was damaged by overflow, because of the construction of levees on the west bank of the river, which was but a part of the Eads system of levee, of which system complaint is made in the present

bill. It was there held that the United States Government was not liable to the claimants in that case for any of the damages to their real estate caused by overflow.

There is this distinction to be made between the condition in that case and in the present one. There Mrs. Jackson's land was in its natural condition, subject to overflow, and the construction of the levees on the west bank served to increase the depth of the overflowing water, and perhaps its frequency. In the case at bar, the land of plaintiff, in its natural state, was not subject to overflow, and it is alleged that it has become subject to overflow annually because of the construction of the levees by the defendants along the west bank of the Mississippi River, in Arkansas, and elsewhere.

This difference in the natural condition between the plaintiff's land and the land in the Jackson case, however, is disposed of in the opinion in that case in this language:

"Let us primarily test the merits of the first ground of complaint, that is, the building of levees. It is not averred that the land of the claimants bordering on the east bank of the river, in the absence of all levees and in a state of nature would not in seasons of high water, be overflowed; and if it had been so alleged, it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible."

This language seems to meet squarely the facts presented in the present case, and to dispose of the question adversely to the plaintiff.

It is true that in the Jackson case, supra, the claim was before the Court of Claims for damages caused by the overflow, while here no damages are sought, but an injunction is prayed for to have discontinued the construction and repairing of the levees on the ground that it is a wrongful act on the part of the defendants to construct and maintain them, and an encroachment upon the rights of the plaintiffs. Since it was held in the Jackson case that the claimant was not entitled to recover for the injuries done by the building and maintaining of the levees, it would seem to

follow that the Mississippi River Commission, as an agent of the Government was and is acting within its rights in constructing and maintaining the levee, and, therefore, should not be enjoined from doing those things complained of, which it had a right to do.

The motion of the defendants, the Mississippi River Commission, E. M. Markham and Clarke A. Smith, must be sustained and the bill dismissed as to them.

An order will be entered accordingly.

McCALL, *Judge.*

APPENDIX "B."

OPINION BY JUDGE FOSTER, AS APPEARS FROM RECORD IN NO. 109, OCTOBER TERM, 1915.

OPINION OF THE COURT. FILED SEPT. 16, 1913.

JOHN F. CUBBINS
vs.
MISSISSIPPI RIVER COMMISSION ET ALS.

No. 14,602. U. S. Dist. Court, Eastern District of Louisiana, New Orleans Division.

Opinion.

In this matter, John F. Cubbins, a citizen of Memphis, Tennessee, files his bill on his own behalf and on behalf of all other members of the Riparian Land Owners Protective Association against the Mississippi River Commission and various State Levee boards. The bill substantially sets up that the land owned by the complainant and the other members of the association, on whose behalf the bill is filed, is not subject to overflow in its natural state but that by the building of levees on the Mississippi River below said land down to the Gulf it is made subject to overflow, and the prayer is for an injunction to prevent the defendants from constructing, maintaining, enlarging and repairing any levee or levees along the Mississippi River, and for general relief. To this the various defendants upon whom citation was obtained in this district have filed general demurrers.

The matter has been learnedly and interestingly discussed by counsel, and the fact that the complainants are deprived of their property without any apparent redress appeals strongly to my sense of equity. It would seem

that someone ought to reimburse these complainants for their losses, and if the damage was prorated among all those who benefit by the building of levees, which undoubtedly cause the destruction of complainants' land, the amount apportioned to each would be infinitesimal, and if a cause of action to recover such damages could lie, relief might perhaps be granted by the joint action of the various courts on a proper bill, though of course no individual could be permitted to impede or destroy such a great work as the building and maintenance of levees along the Mississippi River. But that, as well as every other phase of the question, has been settled by the decision of the Supreme Court in the case of Mattie W. Jackson et als. against the United States, decided June 16, 1913. In the course of his opinion Mr. Chief Justice White took occasion to say: "It is not averred that the land of the claimants bordering on the east bank of the river in the absence of all levees and in a state of nature would not in seasons of high water be overflowed; and if it had been so alleged it is certain that there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible." The remarks of the learned Chief Justice quoted dispose of the only difference between the case at bar and the one considered by the Supreme Court. Therefore the demurrers will be sustained and the bill dismissed.

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complain of the overflow of his land caused by the building of levees along the banks of the river for the purpose of confining the water in times of flood within the river and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination, although keeping the water within the river is to so increase its volume as to raise its level and cause the overflow complained of.

The general right to an unrestrained flow of rivers and streams and the duty not to unduly deflect or change the same by works constructed for individual benefit, qualified by a limitation as to accidental and extraordinary floods, prevail under the Roman Law and also exist in England, and, notwithstanding some contrariety and confusion in adjudged cases, also in this country.

The overflows of the Mississippi River, which the levees objected to by the complainant are designed to prevent, are accidental and extraordinary, and justify the construction of the levees for the purpose of preventing destruction to the valley of the river.

The conditions existing in the valley of the river demonstrate that the work of the Mississippi River Commission, and of the various state commissions, in constructing the series of levees from Cairo to the Gulf is for the purpose of prevention of destruction and improvement of navigation by confining the river to its bed and is not for purposes of reclamation.

Congress had power to create the Mississippi River Commission and through it to build levees to improve the navigation of the Mississippi River, and the Government does not become responsible to riparian owners for the deflection of water by reason of such levees.

The rights of riparian owners on opposite sides of a stream embrace the authority of both, without giving rise to legal injury to the other, to protect themselves from the harm resulting from the accidental or extraordinary floods, such as occur in the Mississippi River, by building levees if they so desire. *Jackson* v. *United States*, 230 U. S. 1.

There is no identity between the great valley of the Mississippi and the flood bed of that river, but the bank of that river is where it is found and does not extend over a vast and imaginary area. *Hughes* v. *United States*, 230 U. S. 24.

THE facts, which involve the rights of riparian owners on the Mississippi River and the power of the Federal and state Governments to construct levees along the same and liability resulting therefrom, are stated in the opinion.

Mr. Barnette E. Moses for appellant:

The right of the Levee District, for the reclamation of lands, to construct levees which have the effect of obstructing the natural flow and turning the water upon the lands of an owner on the opposite side of the river, is not a local question; but is one of general law, on which decisions of the state courts are not binding on the Federal courts. *Cairo & Chicago Ry.* v. *Brevoort*, 62 Fed. Rep. 129; *Hollingsworth* v. *Tensas Commissioners*, 17 Fed. Rep. 115.

The construction of works, for the improvement of navigation, is an exercise of the power of eminent domain, and the owner of private property taken for that purpose must be compensated. *United States* v. *Lynah*, 188 U. S. 445; *Armond* v. *Green Bay Co.*, 31 Wisconsin, 316; *King* v. *United States*, 59 Fed. Rep. 9; *Williams* v. *United States*, 104 Fed. Rep. 50; *Carlson* v. *St. Louis River Co.*, 73 Minnesota, 1128; *Velte* v. *United States*, 76 Wisconsin, 278; Desty, Fed. Const. 322.

The construction of levees for reclamation of lands from overflow, although referable in a certain sense to the police power, is likewise an exercise of the power of eminent domain, and the owner of property taken for such purpose must be compensated therefor. *Reelfoot Levee* v. *Dawson*, 97 Tennessee, 172; *Chicot County Levee* v. *Crittenden*, 94 Fed. Rep. 613; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Hughes* v. *Levee Commissioners*, 27 So. Rep. 744; *Ex parte Martin*, 13 Arkansas, 198; *Carlson* v. *St. Francis Levee*, 59 Arkansas, 513. See also *Eldrige* v. *Trezevant*, 160 U. S. 452; *Bass* v. *State*, 43 La. Ann. 494.

An owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood water, in times of ordinary flood, over his side and cast them upon land on the opposite side. Cases *supra* and see also *Rex* v. *Trafford*, 20 Eng. C. L. R. 498; *Paine Lumber Co.* v. *United States*, 55 Fed. Rep. 854; *Woodruff* v. *N. B. G. M. Co.*, 18 Fed. Rep. 782, 797; *Jones* v. *United*

States, 48 Wisconsin, 385; *Burwell* v. *Hobson*, 12 Gratt. 322; *O'Connell* v. *E. T. Va. & Ga. R. R.*, 87 Georgia, 246, 261; *Garrish* v. *Clough*, 48 N. H. 9; *Parker* v. *Atchison*, 48 Pac. Rep. 631, 632; *Shane* v. *Kans. City, St. Jos. R. R.*, 71 Missouri, 237; *Gulf R. R.* v. *Clark*, 2 Ind. Ter. 319; *Barden* v. *Portage*, 79 Wisconsin, 126; *Crawford* v. *Rumbo*, 44 Oh. St. 279; *Sullivan* v. *Dooley*, 31 Tex. Civ. App. 589; *Byrd* v. *Blessing*, 11 Oh. St. 362; *Myers* v. *St. Louis*, 8 Mo. App. 266; *Menzies* v. *Breadalbane*, 3 Bligh, N. S. 414, 423; *Rix* v. *Johnson*, 5 N. H. 520; *Jones* v. *Soulard*, 24 How. 41; *Adams* v. *Frothingham*, 3 Massachusetts, 352; *Rex* v. *Yarborough*, 3 B. & C. 91; *Scranton* v. *Brown*, 4 B. & C. 485; Gould on Waters, § 209.

For what constitutes a "taking" of property see *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *Boston & R. M. Co.* v. *Norman*, 12 Pick. 467; *Hooker* v. *N. H. & M. Co.*, 14 Connecticut, 146, 160; *King* v. *United States*, 59 Fed. Rep. 9; *Lowndes* v. *United States*, 105 Fed. Rep. 836; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *High Bridge Lumber Co.* v. *United States*, 69 Fed. Rep. 326; *Paine Lumber Co.* v. *United States*, 55 Fed. Rep. 854; *Jones* v. *United States*, 48 Wisconsin, 385; *Velte* v. *United States*, 76 Wisconsin, 278; *United States* v. *Welch*, 217 U. S. 333; *Grizzard* v. *United States*, 219 U. S. 180; *United States* v. *Sewell*, 217 U. S. 601; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *Scranton* v. *Wheeler*, 179 U. S. 141, 153; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 70; *Jackson* v. *United States*, 234 U. S. 115; *C., B. & Q. R. R.* v. *Illinois Drainage Commrs.*, 200 U. S. 593; *McKenzie* v. *Miss. & R. Boom Co.*, 29 Minnesota, 288; *Manigault* v. *Spring*, 199 U. S. 485; *Bierer* v. *Hurst*, 155 Pa. St. 523; 26 Atl. Rep. 742.

The term, natural conditions, is applicable to and should be considered in connection with the ordinary high water stage of the river, as well as the low water

stage thereof, in determining the questions in the cases at bar. *Burwell* v. *Hobson*, 12 Gratt. 322; *S. C.*, 65 Am. Dec. 247; Angell, Water Courses, § 333; *Rex* v. *Trafford*, 20 Eng. C. L. 726; *Cairo, V. & C. R. R.* v. *Brevoort*, 62 Fed. Rep. 129.

Those who were the first to disturb natural conditions, by building a levee cannot recover when a levee was built by others on the opposite bank, even though the Jackson levee and land were thereby destroyed. *Avery* v. *Empire Co.*, 82 N. Y. 582; *Menzies* v. *Breadalbane*, 3 Bligh, N. S. 421; *Wilhelm* v. *Burleyson*, 106 N. Car. 381; *Davis* v. *Munro*, 66 Michigan, 485; *Harding* v. *Whitney*, 40 Indiana, 379; Am. & Eng. Enc. of Law, Vol. XXX, 2d ed., page 387.

The term consequential damages has been used in applying the comprehensive rule stated by counsel, to designate injuries which, in fact, did not amount to a "material impairment" of the value of land. *Gibson* v. *United States*, 166 U. S. 269; *Transportation Co.* v. *Chicago*, 99 U. S. 635.

The permanency of the injury has been expressly treated as one of the determining factors in considering this question. *Hollingsworth* v. *Tensas Comms.*, 17 Fed. Rep. 115; *Cumberland Co.* v. *Hitchings*, 55 Maine, 140; *Bedford* v. *United States*, 192 U. S. 225.

As a matter of law, injuries resulting from work done by the Government, for which immunity from liability was claimed, regardless of the facts as to proximate cause, or the nature of the injury, has been expressly repudiated by this court. *United States* v. *Lynah, supra; Monongahela Nav. Co.* v. *United States, supra; Scranton* v. *Wheeler, supra.*

Intervention of natural forces, as the direct causes of the injuries, made those injuries remote or consequential, in so far as the work of the Government was concerned and there was, therefore, no liability on its part. *Barnes* v.

Marshall, 10 Pac. Rep. 115; *Bedford* v. *United States*, 192 U. S. 225; *Gulf, C. & C. Ry.* v. *Clarke*, 101 Fed. Rep. 678.

No provision for compensation is made by the state acts for the land of appellant; and such provision is an indispensable requisite to their constitutionality. *Sweet* v. *Rechel*, 159 U. S. 380; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Adirondack R. R.* v. *New York*, 176 U. S. 335; *Cherokee Nation* v. *So. Kans. Ry.*, 135 U. S. 541; *Benedict* v. *City*, 39 C. C. A. 290; *Gardner* v. *Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Ex parte Martin*, 13 Arkansas, 198; *Bloodgood* v. *M. & H. Ry.*, 18 Wend. (N. Y.) 9; *Meriwether* v. *St. Francis Levee*, 91 C. C. A. 285.

Compensation must be paid before the property is taken or within a reasonable time thereafter.

The constitutional provision requiring compensation is merely declaratory of the common law, and the right to compensation was recognized before the Constitution. *Staton* v. *N. & C. R.*, 17 L. R. A. 839; *Gardner* v. *Newburgh*, *supra*; *Withers* v. *Buckley*, 20 How. 84; *Kaukena &c. Ry.* v. *Canal Co.*, 142 U. S. 254; *Sinnickson* v. *Johnson*, 17 N. J. L. 129.

Taking private property without compensation is a deprivation thereof without due process of law. Cooley, Const. Lim., p. 357; *Muhlker* v. *New York & H. R. R. R.*, 197 U. S. 544; *Pumpelly* v. *Green Bay & M. Co.*, *supra*; *Scott* v. *Toledo*, 39 Fed. Rep. 385.

Under such conditions the Statute of Limitations does not begin to run until the injury has been consummated. *King* v. *United States*, 59 Fed. Rep. 9; Rev. Stat., § 1069; *Sloggy* v. *Dilworth*, 8 A. S. R. 658; *Del. & Raritan Land* v. *Wright*, 21 N. J. L. 469; Gould on Waters, §§ 412, 414.

Appellant has not been guilty of such laches that a court of equity would deny him relief on that ground. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Harlow* v. *C. & W. Canal*, 18 Oh. St. 179; *New York* v. *Pine*, 185 U. S. 93, 97.

Appellant had no knowledge or reason to believe that the injury would occur, in the case at bar, until it actually happened and this suit was filed within one year thereafter.

There can be no legislation by estoppel. Estoppel cannot give validity to void acts. *Ottawa* v. *Perkins*, 94 U. S. 267; *O'Brien* v. *Wheelock*, 184 U. S. 489.

Equity will enjoin a trespass or nuisance, such as is alleged, where the injury is irreparable and the remedy at law is inadequate, without regard to the solvency of the wrongdoer.

Various contingencies may arise in particular cases, to render the injury irreparable and the remedy at law inadequate.

The injury may be destructive of the very substance of the estate. It may not be susceptible of estimation in terms of money.

It may be vexatiously repeated or continuous, necessitating a multiplicity of suits.

The suit is not a suit against the State, within the meaning of the Eleventh Amendment. *Osborn* v. *Bank*, 9 Wheat. 738; *Hopkins* v. *Clemson College*, 221 U. S. 646; *Smyth* v. *Ames*, 169 U. S. 466.

Public policy, though favoring the construction of levees for the purposes of the appellees, is not opposed to the compensation of appellants for the taking of his property as a direct and proximate result of such improvements.

Public policy is determined, primarily, by the Constitution. *Vidal* v. *Girard*, 2 How. 127; *Missouri* v. *Illinois*, 180 U. S. 208.

Mr. Gerald FitzGerald for Yazoo-Mississippi Delta Levee Board, appellee.

The Solicitor General, with whom *Mr. Robert Szold* was on the brief, for Mississippi River Commission, appellee:

Complainant's bill is altogether lacking in equity.

If plaintiff is entitled to any relief his remedy at law is adequate. *United States* v. *Lynah*, 188 U. S. 445.

The suit is brought against the United States without its consent. *Louisiana* v. *McAdoo*, 234 U. S. 627.

The great public interests involved require denial of the injunction. *Beasley* v. *Tex. & Pac. Ry.*, 191 U. S. 492, 497, 498.

Complainant is entitled to no recovery at law, because his damages are remote and consequential. The authorities are conclusive. *Bedford* v. *United States*, 192 U. S. 217; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24.

In support of the contentions of the Government, see also *Crozier* v. *Krupp*, 224 U. S. 290; *Gibson* v. *United States*, 166 U. S. 269; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *Manigault* v. *Springs*, 199 U. S. 473; *New York* v. *Pine*, 185 U. S. 93; *Scranton* v. *Wheeler*, 179 U. S. 141; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Williams* v. *Parker*, 188 U. S. 491; *Willink* v. *United States*, 240 U. S. 572.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The conditions out of which this controversy arises are substantially the same as those which we relied upon in *Jackson* v. *United States*, 230 U. S. 1. We therefore here make a briefer statement of the topography of the country with which the case is concerned and of the other general conditions involved than we would do if such were not the case, since if a fuller statement as to any particular aspect is desired, it can be readily found by a reference to the report of that case.

The complainant as the owner of a piece of land on the east bank of the Mississippi River adjacent to Memphis,

Tennessee, on his own behalf and on behalf of others owning similar land in the same locality, commenced this suit against the Mississippi River Commission and fifteen local State Levee Boards operating on the river between Cape Girardeau, Missouri, and the mouth of the river at the Gulf of Mexico, three of these boards being organized under the laws of Missouri, four under the law of Arkansas, one under that of Tennessee, one under the law of Mississippi and six under the law of Louisiana.

It was alleged that in flood seasons when the water in the Mississippi River rose above its natural low water banks, such water would flow out and over the vast basins in which the alluvial valley between Cape Girardeau and the gulf formed itself and would then either by percolation gradually flow back into the river or be carried over and through the basins by the streams flowing through them into the Gulf of Mexico where such streams emptied. It was further alleged that the land of the complainant, when the river in the flood periods was thus permitted to discharge its waters, was so situated that it was beyond the reach of overflow from the river. It was then alleged that in 1883 the Mississippi River Commission acting under the authority of Congress had devised a plan known as the Eads Plan by which it was contemplated that on both banks of the river, except at certain places which were stated, a line of embankment or levees would be built which in times of high water or flood would hold the water relatively within the lines of the low water banks, thus improving navigation by causing the water to deepen the bed, and saving the country behind the levees from inundation. It was averred that to further this plan the various state levee boards which were made defendants were organized and that all of them within the scope of their power and the limits of their financial ability had aided in carrying on this work and that as the result of their work and of the levees built by the Mississippi

River Commission it had come to pass that from Cairo to the Gulf, a distance of about 1,050 miles, on both sides of the river, except at points which were stated, there was a continuous line of levees restraining the water from flowing out into the basins as above stated and which in many instances cut off the outlets connecting the streams which drained the basins and ultimately carried off the water to the Gulf. It was charged that this line of levees as a whole had been virtually adopted by the Mississippi River Commission, which body had assumed control of the whole subject, and that such body and all the state agencies coöperating were engaged in strengthening, elevating, renewing, repairing and increasing the lines of levee so as to more effectually accomplish the purpose in view.

It was charged "that the effect of the closing by the defendants of the natural outlets along the said river, and the confining of the flood waters between the levee system as a whole is to obstruct the natural high water flow of the water of said river in and along its natural bed for its entire length, thereby raising the level of the water to such an extent that said flood waters, within the last five years, have attained a sufficient height to flow over complainant's land, and when there is now a high water stage in said river, the waters of said river accumulate, flow over and remain standing upon and over said lands of complainant to a depth of from four to eight feet, so that complainant is now being interrupted in the profitable use, occupation and enjoyment of his said land." And it was further alleged that "said land is being covered with superinduced additions of sand, silt and gravel, now from six inches to three feet in depth; the houses and fences thereon are being washed away, rendering the said land and the houses thereon unfit for occupancy, driving away the tenants, doing irreparable harm and injury to said land, impairing its usefulness,

causing the practical destruction thereof, and destroying its market value."

It was averred that to obstruct the river as alleged was a violation of the legal rights of the complainant since he was entitled to the natural flow of the river within its natural high or low water bed free from interference by the acts of the defendants. Averring that no proceedings had been taken to expropriate the land and that no offer to pay for the same had been made and that the acts complained of constituted a taking without compensation in violation of due process of law under the Constitution of the United States, and that there was no adequate remedy at law, the prayer was for an injunction against the Mississippi River Commission and all its officers, employees, agents and contractors, wherever found, and against all the local levee boards and their officers, employees, agents and contractors, perpetually prohibiting them from further building any levees, from enlarging, strengthening, repairing or doing any act to maintain the levees already built and for general relief.

The bill was amended by alleging that the overflow of complainant's land as averred instead of having happened within five years had occurred within one year, and the original prayer was added to by asking that if it was found that the injunction prayed could not be granted, the case be transferred from the equity to the law side and be converted into a law action to recover from the Yazoo-Mississippi Delta Levee Board, the local Mississippi board which alone of the defendants had been served, the sum of five hundred thousand dollars as the value of the plantation alleged to have been wrongfully taken.

A motion by that corporation was made to dismiss the bill on the ground that it stated no basis for relief, and in any event it alleged no ground for equitable jurisdiction since at best upon the theory that a cause of action was

stated, there was plainly an adequate remedy at law. On the hearing the motion to dismiss was joined in by the Mississippi River Commission, and the case is here as the result of the action of the court below in dismissing the bill for want of equity.

At the threshold we put out of view as primarily negligible contentions as to whether in any event, in view of the vast public interests which would have been detrimentally affected, the injunction prayed could have been granted, and whether the suit should not have been dismissed so far as the Mississippi River Commission was concerned on the ground that it was really a suit against the United States without its consent and not a mere action against individuals acting as officers to prevent them from violating the rights of the complainant by taking his property without compensation. We say these contentions are negligible because underlying them all is the fundamental issue whether under the averments of the bill there was any right to relief whatever, and to that decisive question we come. Its solution involves deciding whether the complainant as an owner of land fronting on the river had a right to complain of the building of levees along the banks of the river for the purpose of containing the water in times of flood within the river and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination in the Gulf, even although it resulted that the effect of thus keeping the water within the river was by increasing its volume to so raise its level as to cause it to overflow the complainant's land.

While we are of the opinion that in substance a negative answer to the proposition must follow from applying to this case the doctrines which were upheld in *Jackson* v. *United States*, 230 U. S. 1, and *Hughes* v. *United States*, *id.*, p. 24, as the unsoundness of the distinctions attempted in the argument to be drawn between those cases and this,

and the decisive application of those cases to this, will be more readily appreciated by a recurrence to the legal principles by which the controversy is to be governed, we address ourselves to that subject, looking at it in a two-fold aspect: First, with reference to the rights and obligations of the land owners and the power of the State to deal with the subject; and Second, with reference to the power of the United States to erect levees to confine the water for the purpose of improving navigation as superimposed on the right of the land owners or that of the state authorities to construct such levees, if such right obtains, and if not, as independently existing in virtue of the dominant power to improve navigation vested in Congress under the Constitution.

1. Without seeking to state or embrace the whole field of the Roman law concerning the flow of water, whether surface or subterranean, or to trace the general differences between that law, if any, as it existed in the ancient law of the Continent of Europe whether customary or written, or as it prevailed in France prior to, and now exists in, the Code Napoleon, one thing may be taken as beyond dispute, that not only under the Roman law, but under all the others the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors in consequence of their right to enjoy the same were protected from undue interference or burden created by obstructions to the flow, by deflections in its course, or any other act limiting the right to enjoy the flow or causing additional burdens by changing it. But while this was universally true, a limitation to the rule was also universally recognized by which individuals in case of accidental or extraordinary floods were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby because all, as the result of the